90-1645

Supreme Court, U.S.
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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ARTHUR TATE, JR., WARDEN,

Petitioner,

v.

JAMES L. BELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a habeas corpus petitioner establish cause for a state court procedural default under *Murray v. Carrier*, 477 U.S. 478 (1986), by merely presenting to the state courts a general claim of ineffective assistance of counsel, or must he present a claim that counsel was ineffective for failing to raise the specific claim procedurally defaulted?

PARTIES

The Petitioner in this action is Arthur Tate, Jr., Warden of the Southern Ohio Correctional Facility at Lucasville, Ohio.[1] The Respondent is James L. Bell, a state prisoner.

[1] Arthur Tate, Jr., is the current Warden of the Southern Ohio Correctional Facility at Lucasville, Ohio replacing former Warden Terry L. Morris.

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The February 27, 1991 order of the United States Court of Appeals for the Sixth Circuit staying the mandate in *Bell v. Morris*, Case No. 90-3551 is unpublished and unreported. (A-2). The January 24, 1991 decision of the United States Court of Appeals for the Sixth Circuit in *Bell v. Morris*, Case No. 90-3551, affirming the judgment of the District Court, is unpublished and unreported. (A-3). The May 25, 1990 order of the United States District Court for the Southern District of Ohio, Western Division in Case No. C-1-85-614 is unpublished and unreported. (A-13). The March 30, 1990 Report and Recommendation of the Magistrate is unpublished and unreported. (A-15). The May 23, 1988 order of the District Court is unpublished and unreported. (A-63). The January 27, 1987 Report and Recommendation of the Magistrate is unpublished and unreported. (A-68). These decisions are reproduced in the appendix to this brief.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered on January 24, 1991. (A-3). On February 27, 1991, an order was issued staying the issuance of the Circuit Court's mandate until April 24, 1991. (A-2) Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.

and Section 1 of the Amendment XIV to the Constitution of the United States:

> [N]or shall any State deprive any person of life,

liberty, or property, without due process of law.

and Section 2254 of Title 28 of the United States Code the relevant portions of which provide:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

* * *

CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ARTHUR TATE, JR., WARDEN,

Petitioner,

v.

JAMES L. BELL,

Respondent.

STATEMENT OF THE CASE

The instant case comes before this Court upon the petition of the State of Ohio for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit in *Bell v. Morris*, Case No. 90-3551, unreported (6th Cir. January 24, 1991). Therein the Circuit Court affirmed the judgment of the District Court granting a writ of habeas corpus based on a jury instruction in violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979), and held that a claim of ineffective assistance of counsel specifically raising the *Sandstrom* violation need not be presented in the state courts as an independent claim to establish cause for a procedural default under *Murray v. Carrier*, 477 U.S. 478 (1986). (A-7). In so ruling the Circuit Court conceded that Respondent did not raise, in his *pro se* brief in the Ohio Supreme Court, a claim that appellate counsel was ineffective for failing to raise the *Sandstrom* issue on appeal. (A-7).

The facts of the case are as follows. In January, 1979 Respondent was indicted by the Scioto County, Ohio Grand Jury on two counts of aggravated murder. A jury later found Respondent guilty as charged and the trial court sentenced him to two consecutive life terms.

Respondent, through different counsel, appealed the decision of the trial court to the Ohio Court of Appeals for the Fourth Appellate District. Respondent, through counsel, assigned as error that (1) there was insufficient evidence to convict; (2) that inflammatory photos and exhibits were improperly admitted; (3) that the trial court erred in refusing to allow a change in venue; and (4) that the trial court erred in refusing to grant a new trial based on newly discovered evidence. By opinion dated October 15, 1980, the Ohio Court of Appeals affirmed the judgment of the trial court.

On December 12, 1980, Respondent filed a *pro se* memorandum in support of jurisdiction in the Supreme Court of Ohio wherein he asserted essentially the same four claims that had been raised in the Ohio Court of Appeals plus a fifth claim that appellate counsel was ineffective. Respondent's claim of appellate counsel's ineffectiveness regarding error in the jury instructions, in its entirety, stated the following:

> Counsel failed to raise on appeal the issue of improper jury instructions wherein the Court repeatedly instructed that all twelve *must* agree on a verdict thereby removing the chance of a hung jury and counsel failed to object or raise on appeal the improper instructions given on aiding and abetting and complicity.

(Sixth Cir. Joint Appendix, at A-129) (emphasis in original). Respondent's *pro se* memorandum was followed by a supplemental memorandum filed by Respondent's counsel wherein it was alleged that there was insufficient evidence of conspiracy, complicity or aiding and abetting and that it was error to admit exhibits and photos of the acts done by the alleged co-conspirator.

On March 18, 1981, the Supreme Court of Ohio overruled Respondent's motion for leave to appeal.

On October 2, 1985, Respondent, through counsel, filed a petition for a writ of habeas corpus in the United States

District Court for the Southern District of Ohio, Western Division. The petition alleged that trial and appellate counsel provided ineffective assistance in a number of respects, including a claim that trial counsel was ineffective for failing to object to jury instructions that relieved the prosecution of its burden of proving that Respondent had an intent to kill. This was the very first time that Respondent alleged that the trial court's jury instructions violated *Sandstrom v. Montana*, 442 U.S. 510 (1979).

On December 2, 1985, Petitioner filed his return of writ arguing that Respondent's petition must be dismissed for failure to exhaust his available state remedy of post-conviction relief.

On January 27, 1987, the Magistrate filed a report with the District Court in which he recommended the dismissal of Respondent's petition for failure to exhaust the available state remedy of post-conviction relief. (A-68). The Magistrate found in particular that Respondent's Ohio Supreme Court *pro se* memorandum failed to designate as error appellate counsel's failure to raise the issue of ineffectiveness of trial counsel. (A-69). The Magistrate found that this precise issue was being argued for the very first time in Respondent's federal habeas corpus proceeding. (A-69).

On May 23, 1988, the District Court rejected the Magistrate's report and recommendation and remanded the case to the Magistrate for a recommendation on the merits of Respondent's claims. (A-63). With regard to the issues of exhaustion and fair presentation of Respondent's claims of ineffective assistance of trial and appellate counsel, the District Court ruled that even though Respondent never raised as error appellate counsel's failure to raise trial counsel's ineffectiveness, Respondent had fairly presented the substance of his federal habeas corpus claim of ineffective assistance of trial and appellate counsel. (A-66 - A-67).

On March 30, 1990, the Magistrate filed a report with the District Court in which he recommended that Respondent's petition for writ of habeas corpus be granted. In his report the Magistrate found that the trial court's jury instructions deprived Respondent of due process under *Sandstrom v. Montana,* 442 U.S. 510 (1979), because the instruction relieved the state of its burden of proving a critical element of the charged offense, Respondent's purpose to kill. (A-44 - A-45). The Magistrate acknowledged that this *Sandstrom* claim had not been presented to the Ohio courts, but then went on to find that "cause and prejudice" had been established by Respondent to overcome this procedural default. (A-54 - A-58). The Magistrate found that defense counsel's failure to object to the jury instruction alone was sufficient to establish "cause" under *Murray v. Carrier,* 477 U.S. 478 (1986). (A-56). The Magistrate did not consider the fact that the claim of ineffective assistance of trial counsel, as it relates to the *Sandstrom* violation, was never presented as an independent claim in the Ohio courts.

On April 11, 1990, Petitioner filed objections to the Magistrate's report.

On May 25, 1990, the District Court issued an order adopting the Magistrate's report and recommendation. (A-13). The District Court ordered that Respondent's petition for writ of habeas corpus be granted unless Petitioner retried Respondent within sixty days or within such further time as the District Court would allow for good cause shown. (A-14). The District Court, in denying Petitioner's objections, found that since the District Court had already ruled that Respondent had "exhausted" his general ineffective assistance of appellate counsel claim in the Ohio courts, the Magistrate was correct in ruling that Respondent's ineffective assistance of trial counsel claim constituted cause for his procedural default in failing to "present" the *Sandstrom* claim. (A-14).

On June 15, 1990, Petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit.

Following briefing and argument, the Circuit Court issued a decision affirming the District Court's grant of habeas corpus. (A-3). On February 14, 1991, Petitioner moved that the Circuit Court's mandate be stayed. On February 27, 1991, the Circuit Court stayed the issuance of its mandate until April 24, 1991. (A-2).

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

The Sixth Circuit affirmed the granting of a writ of habeas corpus based on a *Sandstrom* error[1] which had never been raised in the state trial court, the state appellate court or the state supreme court. (A-6). The Circuit Court found "cause" for this procedural default by way of a general claim of ineffective assistance of appellate counsel that had been presented by Respondent in the Supreme Court of Ohio. The Circuit Court expressly conceded that Respondent did not specifically claim that appellate counsel was ineffective for failing to raise the *Sandstrom* error. The Circuit Court held that such specificity was not necessary. (A-7). The Circuit Court's ruling that specificity is not required in presenting an ineffectiveness claim to establish "cause" overlooks the fact that the Ohio courts never had a fair opportunity to address any ineffectiveness claim relating to the *Sandstrom* error. The Circuit Court's ruling contradicts this Court's holding in *Murray v. Carrier,* 477 U.S. 478 (1986), where this Court said that the exhaustion doctrine must be complied with before a claim of ineffective assistance of counsel may be used to establish "cause" for a procedural default.

In *Murray v. Carrier,* this Court held that ineffective assistance of counsel may be cause for a procedural default. The Court went on, however, to state that "the exhaustion

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[1] The District Court granted the writ based on a violation of *Sandstrom v. Montana,* 442 U.S. 510 (1979). However, the Sixth Circuit suggested that the violation was more appropriately analyzed as a violation of *Mullaney v. Wilbur,* 421 U.S. 684 (1975). *See Bell v. Morris,* (6th Cir. Slip Op. Jan. 24, 1991) at 4 n.2. (A-6). For the sake of simplicity, the claim will be referred to throughout this petition as a *Sandstrom* claim.

doctrine . . . requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." 477 U.S. at 488-89. The exhaustion doctrine codified in 28 U.S.C. §2254 "requires a federal habeas petitioner to provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim." *Anderson v. Harless,* 459 U.S. 4, 6 (1982) (*per curiam*) (quoting *Picard v. Connor,* 404 U.S. 270, 276-277 (1971)).

> It is not enough that all the facts necessary to support the federal claim were before the state courts, . . . or that a somewhat similar state-law claim was made. In addition, the habeas petitioner must have 'fairly presented' to the state courts the 'substance' of his federal habeas corpus claim.

Id. (quoting *Picard* at 275, 277-278).

This Court in *Murray v. Carrier* recognized that "[t]he principle of comity that underlies the exhaustion doctrine would be illserved by a rule that allowed a federal district court 'to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation' . . . " *Id.,* at 489 (quoting *Darr v. Burford,* 339 U.S. 200, 204 (1950)). The Court in *Murray v. Carrier* further stated that the principle of comity "holds true whether an ineffective assistance claim is asserted as cause for a procedural default or denominated as an independent ground for habeas relief." *Id.*

In the instant case, the ineffectiveness claim relating to the *Sandstrom* issue was first raised in the federal court. (A-7). The legal and factual bases for this particular ineffectiveness claim were never brought before the state courts. A number of circuits have held that raising a new claim of trial counsel's ineffectiveness for the first time in federal habeas corpus violates the exhaustion doctrine because the state courts never had a fair opportunity to consider the claim. *Domaingue v. Butterworth,* 641 F.2d 8

(1st Cir. 1981) (ineffective assistance of counsel claim found unexhausted being materially broader than the claim presented in the state courts); *United States ex rel. Boodie v. Herold,* 349 F.2d 372 (2nd Cir. 1965) (state courts were never given opportunity to rule on claim of denial of counsel in light of all relevant facts, thus claim was unexhausted); *Brown v. Estelle,* 701 F.2d 494 (5th Cir. 1983) (ineffective assistance of counsel claim found unexhausted being in a significantly different and stronger evidentiary posture than was before the state courts); *Laws v. Armontrout,* 834 F.2d 1401 (8th Cir. 1987), *cert. denied,* 490 U.S. 1040 (1989) (new factual allegations make petitioner's ineffectiveness claim a different one from that presented in the state courts, thus the claim was unexhausted); *Schiers v. People of State of California,* 333 F.2d 173 (9th Cir. 1964) (ineffective assistance of counsel claim found unexhausted even though presented in state courts because federal habeas corpus claim asserted facts outside the record which were not raised in state courts). *Jones v. Hess,* 681 F.2d 688 (10th Cir. 1982) (material evidence first presented in federal habeas petition puts claim of judicial bias in a significantly different and stronger posture than was considered in state courts, accordingly, claim was unexhausted).

The Sixth Circuit in the present case has ruled contrary to *Murray v. Carrier* and precedent in at least six other circuits on the question of exhaustion of a materially different ineffectiveness claim.[2] The ineffectiveness claim used to establish cause for trial counsel's procedural default in this case clearly should have been presented to the state courts. The state courts never had a fair opportunity to review this claim of counsel ineffectiveness because it was never raised

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[2] The Sixth Circuit has likewise ruled in this manner in *Sampson v. Love,* 782 F.2d 53 (6th Cir.), *cert. denied,* 479 U.S. 844 (1986) and *Kilby v. Jones,* 809 F.2d 324 (6th Cir. 1987).

anywhere in the state courts.[3] The comity principle behind the exhaustion doctrine mandated by this Court in *Murray v. Carrier* has been violated by the Sixth Circuit. Certiorari should be granted to make clear that a particular claim of ineffective assistance of counsel used to establish "cause" for a procedural default must be fairly presented in the state courts so that the state courts have a fair opportunity to address the claim.

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[3] The ineffectiveness claim used to establish cause was not presented to the state courts, and consequently was procedurally defaulted under *Wainwright v. Sykes*, 433 U.S. 71 (1977) since Respondent could have and should have raised the claim in the Supreme Court of Ohio. *In Re Petition of Brown*, 49 Ohio St. 3d 222, 223, 551 N.E.2d 954, 955 (1990); *Ohio v. Roberts*, 1 Ohio St. 3d 36, 39, 437 N.E.2d 598, 600 (1982); *Ohio v. Cole*, 2 Ohio St. 3d 112, 443 N.E.2d 169 (1982); *Ohio v. Perry*, 10 Ohio St. 2d 175, 226 N.E.2d 104 (1967). This Court in *Murray* "did not hold that to be raised as cause to excuse a prior procedural default a claim of ineffective assistance of counsel must only be exhausted in state court. Rather, *Murray* stands for the proposition that before an ineffective assistance of counsel claim may be raised as cause in federal habeas, it must first be exhausted in state court *and* not be procedurally defaulted. Any other reading of *Murray* eviscerates *Wainwright*." *Justus v. Murray*, 897 F.2d 709, 714 (4th Cir. 1990) (emphasis in original).

CONCLUSION

Respondent submits that a writ of certiorari should therefore be issued to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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NO. 90-3551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

JAMES L. BELL, :

Petitioner-Appellee, :

v. :

TERRY L. MORRIS, SUPT., : Filed February 27, 1991
[File stamp deleted]

Respondent-Appellant. :

BEFORE: KENNEDY AND MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

Upon consideration of appellant's motion to stay mandate pending the filing of a petition for writ of certiorari,

It is ORDERED that the motion be, and hereby is, GRANTED. The issuance of the mandate shall be stayed until April 24, 1991.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Leonard Green, Clerk

NO. 90-3551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES L. BELL,	:	
Petitioner-Appellee,	:	On Appeal from the United States District
v.	:	Court for the Southern District of Ohio.
TERRY L. MORRIS, SUPT.,	:	
		Filed January 24, 1991
Respondent-Appellant.	:	[File stamp deleted]

BEFORE: KENNEDY and MILBURN, Circuit Judges; and ENGEL, Senior Circuit Judge.

KENNEDY, Circuit Judge. In May 1990, the District Court granted the petitioner, James L. Bell, writ of habeas corpus. Respondent, Terry L. Morris, appeals, raising the issue of whether, given the procedural posture of this case, the District Court properly reached the merits of the petition. Although the respondent does not focus on the merits of the petitioner's claims, they must be examined in determining whether there is a procedural bar. After an examination of the record and issues before us, this Court finds that the jury was instructed in violation of *Mullaney v. Wilbur,* 421 U.S. 684 (1975) and the requirements of Ohio law as construed in *Clark v. Jago,* 676 F.2d 1099 (6th Cir. 1982), *cert. denied,* 466 U.S. 977 (1984). The District Court's grant of habeas corpus is, therefore, affirmed.

In January 1979, petitioner was indicted on two counts of aiding and abetting aggravated murder, in violation of Ohio Rev. Code Ann. §2903.01(A) (Anderson 1987). He was convicted of both charges. On January 24, 1979, the petitioner, along with two companions, David Gambill and Terry Reeder, went to the house of the two victims, Donna Kennard and Deborah Coleman. Petitioner had with him

a gun belonging to Gambill. Petitioner had accompanied Gambill when Gambill purchased the gun on January 17, and the bullets on January 23, the day before the killing. Prior to that evening, the petitioner and Gambill had argued with the victims on several occasions. Most recently they had argued over money to pay for damage the victims had caused to the petitioner's car. There was evidence that the petitioner had issued a veiled threat against the victims within the last month. After spending the evening of January 24 at a bar drinking, Gambill, Reeder and the petitioner went to the victims' home. Reeder testified that they went there on petitioner's suggestion, so that he could get money for the damage to his car, and that upon arriving at the victims' home the petitioner pulled the phone from the wall. An argument began, and the petitioner removed the gun from his belt and pointed it at one of the victims. Gambill demanded the gun from the petitioner, who gave it to him. Gambill then shot and killed the victims. Gambill and the petitioner were later arrested and tried separately for the murders.

The petitioner appealed his conviction to the Ohio Court of Appeals, claiming that: (1) there was insufficient proof of conspiracy, complicity, or aiding and abetting; (2) the trial court erred in admitting into evidence certain photographs and physical exhibits; (3) the trial court erred in refusing to grant petitioner's motion for change of venue; and (4) the trial court erred in refusing to grant the petitioner a new trial because of evidence discovered after the trial. The Ohio Court of Appeals overruled the first three assignments of error, and refused to reach the fourth on the merits because notice of appeal had not been timely filed with respect to that claim.

The petitioner then sought to appeal his conviction to the Ohio Supreme Court in forma pauperis, and filed a brief in support of reversal of his conviction. Petitioner raised the same issues to the Ohio Supreme Court that had been raised to the Ohio Court of Appeals, except that he added a claim of ineffective assistance of appellate counsel in violation of the Constitution. He stated in his

pro se brief that appellate counsel was ineffective in failing to raise on appeal trial counsel's failure to object to the jury instructions. A supplemental brief was later filed by counsel for the petitioner. Counsel's brief, however, raised only the issues of whether there was sufficient evidence to convict petitioner and whether certain evidence had been improperly admitted. The Ohio Supreme Court denied the petitioner's motion for leave to appeal. The petitioner's motion for a new trial was denied, and petitioner never sought post-conviction relief pursuant to Ohio Rev. Code Ann. §2953.21. Bell then petitioned in federal district court for habeas corpus. Initially, the magistrate recommended that the petition be dismissed because it contained both exhausted and unexhausted claims and therefore was procedurally barred. The District Court rejected that recommendation and remanded the petition for a recommendation on the merits. The magistrate's subsequent recommendation, adopted by the District Court, was to grant the petition on the basis that the trial court's jury instructions were in violation of *Sanderstrom v. Montana*, 442 U.S. 510 (1979). This appeal follows.

I. Exhaustion of state remedies

Under 28 U.S.C. §2254, a writ of habeas corpus can only be granted if the petitioner has exhausted the available state remedies. The first line of inquiry, therefore, must be to determine whether the petitioner has exhausted his state remedies. Petitioner appealed his conviction to the Ohio Court of Appeals, and sought an appeal to the Ohio Supreme Court. He has, therefore, exhausted his direct state appeals. Ohio does, however, have a post-conviction proceeding through which the petitioner could raise collateral issues in a challenge to his conviction. *See* Ohio Rev. Code Ann. §2953.21. The petitioner failed to bring a post-conviction challenge but would be barred from raising any issues that he could have raised in his direct appeal, including the issue of whether the jury instructions violated due process. Res judicata, therefore,

would prevent consideration of that issue. *See Ohio v. Cole*, 2 Ohio St. 3d 112 (1982).[1]

Having concluded that the petitioner has no state remedy left at his disposal with respect to the instructions or sufficiency of evidence, we must next determine whether he waived his right to challenge his conviction in federal court by failing to raise in state court the issues upon which he bases his petition. In *Leroy v. Marshall*, 757 F.2d 94 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985), this Court held that a petitioner "must be held to have waived his right to challenge his convictions" upon those grounds that he failed to assert in the state appellate courts unless he can show" 'cause and prejudice' which would provide a legal justification for the federal court to look beyond the procedural bar. . . ." *Id.* at 97. Because the petitioner did not specifically raise the issue in the state proceedings of whether the jury instructions violated *Sandstrom*, 442 U.S. at 510,[2] petitioner must show cause for that procedural default before a federal habeas court can address the merits of his claims.

The petitioner's claim here is that the instructions given by the state trial court were in violation of *Sandstrom v. Montana*. The *Sandstrom* issue, however, was never raised in Ohio state court. That failure to raise the issue in state court results in a procedural default because

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[1] Respondent argues that petitioner must raise all possible claims in state court proceedings before he can seek habeas in federal court. This Court, however, has held that this is not the case. "[T]he mere presence of the unexhausted claim does not require dismissal of the petition." *Ewing v. McMackin*, 799 F.2d 1143, 1150 n.12 (6th Cir. 1986). Therefore, although a federal court cannot address issues that have not been exhausted in state court, it can address issues that have been exhausted even if there are other issues in the cause that have not been exhausted.

[2] The parties have addressed the issue as a *Sandstrom* violation although it appears to be more accurately categorized as a *Mullaney* or *In re Winship*, 397 U.S. 358 (1970) violation. *See* discussion, *infra* at section II.

under federal habeas procedure a petitioner must have given the state court an opportunity to address an issue before a federal court can consider it. In order to overcome that procedural default the petitioner must establish cause and prejudice. In *Murray v. Carrier,* 477 U.S. 478, 488 (1986), the Supreme Court held that the cause required to overcome a procedural default can be established if the petitioner can prove that ineffective assistance of counsel in violation of *Strickland v. Washington,* 466 U.S. 668 (1984), caused the default. The petitioner claims that ineffective assistance of appellate counsel caused him to fail to raise the *Sandstrom* issue in state court. "[T]he cause and prejudice test applies to default on appeal as to those at trial." *Murray,* 477 U.S. at 491. *Murray* requires, however, that "a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Id.* at 489. Petitioner did raise the issue of ineffective assistance of appellate counsel in his pro se brief seeking review by the Ohio Supreme Court. Although he did not claim in his pro se brief that appellate counsel was ineffective in failing to raise the *Sandstrom* issue itself, such specificity is not necessary. Petitioner raised the issue of ineffective assistance of counsel to the Ohio Supreme Court, giving the state court the opportunity to rule on that issue. Petitioner, therefore, has shown cause for his failure to raise the *Sandstrom* issue in state court. If petitioner's appellate counsel had been effective, the *Sandstrom* issue would have been raised in his direct appeal in state court. It is not necessary that the state court have actually addressed the issue which the petitioner claims as cause, but only that the state court have had an opportunity to do so.

Having established cause is not, however, the end of the procedural analysis in this habeas petition. In addition to showing cause, the petitioner must also show prejudice. Petitioner can only establish prejudice if there was indeed a *Sandstrom* violation. We must therefore proceed with an analysis of the substance of the habeas petition.

II. *Sandstrom* violation

The magistrate concluded that the trial court had violated *Sandstrom*, 442 U.S. at 510, by instructing the jury that:

> In the absence of a conspiracty [sic], one may not be held as a principal, if he is merely present during the commission of a crime where he has not procured, encouraged or participated in such crime. . . . However, if you find that the Defendant and David L. Gambill entered into a conspiracy or had a common purpose or design to commit an unlawful act, such as attempting to obtain money by means of threats or violence, a different rule applies. The aider and abettor is criminally responsible for any act done in furtherance of the common criminal enterprise, whether intended by him or not, if such act might have been reasonably contemplated by him as probable or likely to result from an attempt to commit the crime intended; or, as otherwise stated, he is bound by the consequences naturally or probably arising in its furtherance and, in case of death, is guilty of homicide. Each is responsible for everything done by his confederate which follows incidentally in the execution of a common design as one of its probable and natural consequences even though it was not intended as part of the original design or common plan.
>
> * * *
>
> It must be established in this case that at the time in question there was present in the mind of David L. Gambill a specific intention to kill Donna Jean Kennard and Deborah Renee Coleman.

Joint App. at 851-52, 854.

The magistrate concluded that these instructions violated *Sandstrom* because they shifted the burden of proof from the prosecutor to the petitioner by allowing the jury to presume intent from a certain set of facts. According to *Sandstrom*, the court cannot relieve the state of its burden of proving each element of an offense by instructing the jury that it must presume any element of the crime.

Ohio does not have a strict felony murder rule, but instead has instituted a "modified" felony murder rule. The statute under which the petitioner was convicted states that:

> [i]n no case shall a jury in an aggravated murder case be instructed in such a manner that it may believe that a person who commits or attempts to commit any offense. . . is to be *conclusively* inferred, because he engaged in a common design with others to commit [an] offense by force and violence or because the offense and the manner of its commission would be likely to produce death, to have intended to cause the death of any person who is killed. . . .

Ohio Rev. Code Ann. §2903.01(D) (emphasis added). *See also* §2923.03(A)(2). The Ohio Supreme Court addressed this statute in *Ohio v. Lockett*, 49 Ohio St. 2d 48 (1976), *rev'd on other grounds*, 438 U.S. 586 (1978). The *Lockett* court held that a person who engages in a common design to commit a crime by force, with the use of a deadly weapon is guilty of a homicide that occurs during the commission of the crime because "a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which must be presumed to have been intended, and such evidence is sufficient to allow a jury to find a purposeful intent to kill." *Lockett*, 49 Ohio St. 2d at 48-49 (syllabus ¶¶3, 4).

The decision in *Lockett* was explained further in *Ohio v. Scott*, 61 Ohio St. 2d 155 (1980). In *Scott*, the Ohio

Supreme Court affirmed the Ohio Court of Appeals' reversal of an aggravated murder conviction in which the jury was instructed that if the defendant was involved in a conspiracy to kidnap, he was necessarily guilty of the homicide that resulted from it. Rather, the Ohio Supreme Court stated that,

> [a] jury can infer an aider and abettor's purpose to kill where the facts show that the participants in a felony entered into a common design and *either* the aider and abettor knew that an inherently dangerous instrumentality was to be employed to accomplish the felony *or* the felony and the manner of its accomplishment would be reasonably likely to produce death.

Id. at 165 (emphasis in original). Ohio, therefore, does not follow the strict felony murder rule, in that a defendant cannot be convicted of aggravated murder solely because he engaged in a felony that resulted in a murder. Instead, the prosecution must always prove intent, even where the defendant was an aider and abettor. Under *Scott* and *Lockett,* however, intent may be found by the jury where the defendant entered into a conspiracy to commit a felony when that felony is committed in such a way that it might result in death. "*Lockett* describe[d] the factual basis from which a jury could *infer* appellant's purpose to kill, as required by the aggravated murder statute." *Id.* at 166 (emphasis in original).

The court below relied on this Court's earlier decision in *Clark v. Jago,* 676 F.2d at 1099, in concluding that there was a *Sandstrom* violation. The decision in *Clark* is binding precedent in this Circuit. *Clark* interpreted *Scott* to hold that Ohio's modified felony rule nonetheless required the prosecution to prove that the aider and abettor had the intent to kill, and found that the Ohio trial court had violated *Sandstrom* in failing to give an instruction on intent. The defendant in *Clark* was convicted by a jury following instructions that required that the jury find that the defendant caused the death,

that the killing was done while the defendant was committing a felony, and that the killing was purposeful. The jury was further instructed that either the defendant or his accomplice had to have had the intent to kill. The *Clark* Court held that as a whole those instructions relieved the prosecution of its burden of proving intent. It permitted the jury to find the essential intent element in the accomplice who did the actual killing rather than in the defendant. Although unlike "*Sandstrom*, this case does not directly involve the use of a presumption as such," the principle of Sandstrom still applies because "[t]he jurors were never told that [the defendant's] culpability, whether established by direct proofs or by the *Lockett-Scott* inference must be first established before he can be an aider or abettor or an accomplice to aggravated murder." *Clark*, 676 F.2d at 1104-05.

Like Clark, this case does not involve the presumption instruction upon which *Sandstrom* relies, and therefore *Mullaney*, 421 U.S. at 684, may better illustrate the constitutional violation that is involved in the case before us. *Mullaney*, from which *Sandstrom* follows, involved Maine's practice that while the prosecution had the burden to prove that a defendant was guilty of manslaughter, in order to avoid a conviction and sentence for murder, a defendant in a homicide case had to prove by a preponderance of the evidence that the homicide was committed in the heat of passion. The *Mullaney* Court held that the Maine practice violated the due process clause because it relieved the prosecution of its burden to prove each element of the crime beyond a reasonable doubt. *See also In re Winship*, 397 U.S. 358 (1970) (prosecution required to prove beyond a reasonable doubt each element).

Following the precedent in *Clark*, this Court concludes that the jury instructions given at trial were in violation of the due process clause. They failed to make it clear to the jury that it must find that Bell had an intent to kill the victims. Nowhere was the jury told that in order to convict Bell it must find that the prosecution had proved

that Bell had an intent to kill, an intent that could be inferred from a conspiracy or his acts in participating in a violent crime likely to result in death. Admittedly the instruction contained a discussion about the law of aiding and abetting and conspiracy. But when the court continued its instructions, the only instruction regarding intent to kill was that the accomplice Gambill have an intent to kill. Although the jury could have inferred from the evidence of Bell's actions and the role he played the night of the killings that he had an intent to kill, the jury was simply never instructed in that they must find intent to kill on the part of Bell. Having failed to do so, the instructions did not require proof of an element of the crime as we determined the elements of Ohio law to be in *Clark*. Further, before the petitioner may be found guilty of aggravated murder, he must first be found to have been an aider and abettor or a co-conspirator. The trial court did not instruct the jury on the prosecution's duty to establish beyond a reasonable doubt that the petitioner had entered into a conspiracy to commit a felony by means of force or with the use of a dangerous weapon and that it would be reasonably likely that a death would result from the conspiracy. *See Scott*, 61 Ohio St. 2d at 165. The instructions, therefore, relieved the prosecution of its duty to prove each element of the crime beyond a reasonable doubt, in violation of *Mullaney v. Wilbur*. The District Court's grant of habeas corpus is, therefore, AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES L. BELL,	:
Petitioner,	: No. C-1-85-1614
vs.	:
TERRY L. MORRIS,	: ORDER ADOPTING MAGISTRATE'S REPORT
Respondent.	: AND RECOMMENDATION Filed May 25, 1990
	: [File stamp deleted]

This matter is before the Court on the respondent's motion to review (doc. 27) the Magistrate's Report and Recommendation (doc. 25), to which the petitioner has responded (doc. 28).

The petitioner is serving two consecutive life terms under the respondent's custody at the Southern Ohio Correctional Facility for his conviction in 1979 on two counts of aggravated murder in violation of Ohio Rev. Code §2903.01(A). The Ohio Court of Appeals affirmed the verdict of the trial court, and the Ohio Supreme Court dismissed Bell's appeal for failure to state a substantial constitutional question. The petitioner brings this habeas corpus action pursuant to 28 U.S.C. §2254, and asserts as grounds for relief that he received ineffective assistance of counsel at the trial court level and on appeal.

The Magistrate found that the jury instructions improperly relieved the state of its burden of proving the petitioner's purpose to kill in violation of the due process clause. *See Sandstrom v. Montana,* 442 U.S. 509 [sic] (1979); *State v. Lockett,* 49 Ohio St.2d 48 (1976), *modified in part,* 438 U.S. 586 (1978). The Magistrate also found that the failure of the petitioner's trial counsel to object to the jury instructions constituted ineffective assistance

of counsel. The Magistrate ruled that the ineffective assistance of counsel received by the petitioner constituted cause for the petitioner's procedural default in failing to object to the jury instructions at trial. The Magistrate also ruled that the petitioner was prejudiced by the procedural default. We have carefully reviewed the very thorough and well reasoned opinion of the Magistrate, and we find it to be correct.

The respondent argues that the Magistrate improperly found the petitioner's ineffective assistance of counsel claim to constitute cause for the petitioner's procedural default. The respondent contends that "the exhaustion doctrine. . .generally requires that a claim of ineffective assistance be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). However, we have already ruled that the petitioner has exhausted his ineffective assistance of counsel claim in the state courts in our Order of May 23, 1988 (doc. 13). Therefore, the Magistrate was correct in ruling that the petitioner's ineffective assistance of counsel claim constitutes cause for his procedural default, and the respondent's objections to the Magistrate's Report and Recommendation are hereby denied. Having reviewed this matter *de novo* pursuant to 28 U.S.C. §636, we hereby accept the Magistrate's Report and Recommendation.

Accordingly, the petitioner for writ of habeas corpus is granted unless the respondent retries the defendant James L. Bell within sixty days of the date of this Court's final judgment, or within such further time as the Court will allow for good cause shown.

SO ORDERED.

/s/ S. Arthur Spiegel

S. Arthur Spiegel
United States Disrict Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES L. BELL,

Petitioner

vs

Case No. C-1-85-1614

TERRY L. MORRIS,

Filed March 30, 1990
[Filed stamp deleted]

Respondent

REPORT AND RECOMMENDATION

Petitioner James L. Bell, an inmate in state custody at the Southern Ohio Correctional Facility, Lucasville, Ohio, brought this action pro se and *in forma pauperis* for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Thereafter Bell obtained counsel who filed a memorandum of law in support of his petition. This matter is before the Court on the petition, the supporting memorandum, respondent's return of writ, supplemental return of writ, second supplemental return of writ, and Bell's response to the second supplemental return of writ. (Docs. 2, 8, 19, 23, and 24).

FACTUAL BACKGROUND

Bell was indicted by the January 1979 term of the Cuyahoga [sic] County Grand Jury on two counts of aggravated murder in violation of Ohio Rev. Code Ann. §§2903.01(A), 2929.04(A)(5) (Anderson 1987) (effective Jan. 1, 1974). The case was tried to a jury and Bell was convicted of both charges. He was sentenced to two terms

of life imprisonment. (Doc. 8, Exs. C, D).

The following factual summary is entitled to presumption of correctness since it corresponds with the facts compiled by the Ohio Court of Appeals Fourth Appellate District, and Bell has not established that these facts are erroneous. *See* §2254(d); *Marshall v. Lonberger,* 459 U.S. 422 (1983); *Sumner v. Mata,* 455 U.S. 591 (1981); *Nichols v. Perini,* 818 F.2d 554 (6th Cir. 1987).

On the morning of January 24, 1979, the bodies of Donna Kennard and Deborah Coleman were discovered in their home, a trailer located in Washington Township, Scioto County, Ohio. Each had been shot twice in the head, their bodies had been abused, and their trailer was in disarray. Later that day Bell and David Gambill were arrested on aggravated murder charges. The two were tried separately.

The evidence at Bell's trial disclosed long-standing friendships among the victims, Bell, and Gambill. These relationships began to deterioate some months before the murders, when Coleman allegedly crashed her automobile into Bell's 1978 Camaro, and Kennard allegedly shattered the Camaro's windshield with a crowbar. On December 24, 1978, Bell and Gambill went to the trailer to obtain money for the damage to the Camaro. Coleman's mother testified that Bell demanded money and refused to leave. At some point Coleman's father arrived armed with a firearm and ordered Bell and Gambill to leave. Gambill, while sitting in an automobile, stated to Coleman's mother, "I got a gun on you" and "you don't care what happens to the girls, do you?" (Tr. 132). Bell and Gambill left after a deputy sheriff arrived.

On January 1, 1979, while at a New Year's Eve Party, a witness heard Coleman and Bell arguing about the money Bell wanted for the damage to his Camaro. The witness testified that Bell told Coleman, "things could happen to Libby, thats [sic] Debbie's mother and things

could happen to her house and the girls and Paul's equipment and things like that." (Tr. 203-04).

The principal witness presented by the state was Terry Reeder, a friend of both victims, as well as Bell and Gambill. He testified that on the evening of January 21, 1979, he, Bell, and Gambill went to a number of local taverns. At the last tavern, they drank and danced with female acquaintances. At one point Gambill stood up to dance and placed a revolver on the booth where the three were sitting. Reeder picked it up and passed it to Bell.

Reeder testified that after the three left the tavern they drove around trying unsuccessfuly to locate certain friends. At some point Bell said, "I think I'll go see [Kennard] and see if she'll give me some money for my car." (Tr. 231). Reeder also testified that he wanted to go to the trailer to see if another friend, Janet Barfield, was there. The three went to the trailer, entered and awoke Kennard and Coleman. Bell "jerked [the telephone] from the wall" and stated, "all right, now you can't call nobody, nobody knows I'm here . . . [Coleman's] dad can't come up here and jump on me now." (Tr. 232).

Reeder testified that Bell and Kennard began arguing about money. Kennard stated she had none and asked Bell to leave. The argument escalated; each called the other "bad" names. (Tr. 232). According to Reeder, Bell removed the revolver from the back of his pants during the argument, "flashed it around a little bit," and told Kennard, "I want some money." (Tr. 233). Reeder testified that during the argument Bell pointed the revolver at Kennard. (Tr. 233-34). At some point Gambill began arguing with Kennard, and asked Bell for the revolver.

After Bell handed the revolver to Gambill, Gambill argued with Kennard about money and matters that had occurred when they had lived together. Reeder testified that Gambill told Kennard, "either you're going to give me some money or you're going to pay him or I'm gonna shoot you . . . . So, [Coleman] looked at [Gambill] and

. . . said, 'Gambill, I'd rather be dead than sit here and listen to your mouth.' And [Gambill] said, 'you would' and she said, 'yeah.' So he looked at [Kennard] and told her he hated her and he shot her." (Tr. 234-35). Gambill then shot Coleman, turned and shot Kennard again, turned back toward Coleman and shot her again. Prior to the last shot, Bell and Reeder left the trailer and entered Bell's Camaro. Bell started the engine, and Gambill entered the passenger's side. Reeder testified that while they were driving away, Gambill "turned around and held his gun kind of between me and Jimmy and had it pointed straight towards the top of the car and he told me and Jimmy, 'anything said about this, the same thing will happen to you two.' " (Tr. 236).

Reeder testified that after they returned to Bell's home, Bell told him, "I wish to God Gambill hadn't killed those girls." (Tr. 369). Several hours later, Gambill and Reeder returned to the trialer, at Reeder's suggestion, to wipe away any fingerprints they had left. Bell refused to go with them. While Reeder was wiping his fingerprints from items in the living room, he saw Gambill burning Kennard's body with a cigarette lighter. Gambill then picked up a broom and inserted the handle into Coleman's rectum. Reeder then insisted on leaving and Gambill followed him from the trailer. After leaving the trailer, Gambill told Reeder not to tell Bell what he had done to the bodies. The state did not dispute Reeder's testimony that Bell was absent when Gambill abused the bodies. (Tr. 238-39).

The evidence Bell presented in his case-in-chief, including his own testimony, substantiated the state's evidence except as follows: Bell's testimony depicted Gambill as a quiet, nonviolent person. He testified that Coleman and Kennard invited him to the trailer on December 24, 1978. He denied threatening Coleman or Kennard on January 1, 1979. He also denied that it was his suggestion to go to the trailer on the night of the murders. He testified that he did not tear the telephone from the wall but admitted that he unscrewed the phone's mouthpiece. In response to his trial counsel's question

of whether he ever pointed the revolver at Kennard, Bell answered, "[w]hen I took the gun out, [it] could have been pointed at her, because I was standing facing her and when I took the gun out and retched [sic] across and handed it to Dave Gambill, it could have been pointed at her." (Tr. 292). Bell also testified that he did not go to the trailer to extort money from Kennard or Coleman. "Essentially, by all of his testimony, he asserted he was only a bystander when the shooting occurred." (Doc. 8, Ex. E; *Ohio v. Bell,* No. 1252, slip op. at 7 (Ohio App. Oct. 15, 1980)).

PROCEDURAL BACKGROUND

Bell took a direct appeal of his conviction to the Court of Appeals of Ohio, Fourth Appellate District, asserting four assignments of error. The Court of Appeals overruled three of the alleged errors on the merits and declined to reach the merits of the fourth due to Bell's appellate counsel's failure to timely appeal the issue. The Court of Appeals affirmed the judgment of conviction on October 15, 1980. (Doc. 8, Ex. E).

Bell then sought leave to appeal pro se to the Supreme Court of Ohio, presenting numerous propositions of law. *Id.* at Exs. F, G. The Supreme Court of Ohio denied leave to appeal on March 18, 1981. Bell did not seek further review by way of a state post-conviction hearing. *Id.* at Ex. I.

Bell instituted this action on October 2, 1985. He raises the following grounds for relief:

1. denial of effective assistance of counsel at trial;

2. denial of due process due to jury instructions; and

3. ineffective appellate counsel.

(Doc. 2).

On January 27, 1987, the United States Magistrate issued a report recommending that Bell's petition be dismissed as a mixed petition due to his failure to exhaust his state remedies. (Doc. 10). On May 23, 1988, the district court rejected the report ruling that Bell had exhausted his state remedies. The district court remanded the case to the Magistrate for report and recommendation on the merits of the issues presented. (Doc. 13). Thereafter, respondent filed a supplement return of writ, and a second supplemental return of writ; Bell filed separate responses to respondent's supplemental return of writs. (Docs. 19,20,23, and 24).

CONTENTIONS OF THE PARTIES

Respondent continues to argue that Bell's petition should be dismissed due to his failure to exhaust his ineffective assistance of trial counsel claims and his ineffective assistance of appellate counsel claim because he has not pursued these claims under Ohio's post-conviction relief statute Ohio Rev. Code §2953.21 (Anderson 1987). (Doc. 19, pp. 1-4). This argument is foreclosed by the District Court's previous rejection of respondent's exhaustion arguments. The District Judge has remanded the case for a recommendation on the merits of Bell's claims. (Doc. 13, p.6).

Turning to the merits of the petition, Bell contends that his trial counsel was ineffective because counsel:

1. failed to effectively prepare for trial;

2. failed to impeach two witnesses with audio-tapes, videotapes, and an affidavit of one of the witnesses in counsel's possession;

3. failed to subpoena David Gambill, another party charged with the same offense, and Gambill's mother and step-father;

4. failed to request a jury instruction on the lesser included offenses of negligent homicide and failure to secure a dangerous ordinance;

5. failed to adduce evidence of Gambill's drug use;

6. failed to argue any factors that the court should have considered in mitigation before sentencing Bell to two terms of life imprisonment;

7. failed to object to the jury instructions;

8. failed to obtain an impartial jury and refrain from prejudicial statements of the nature of the crime in the jury's presence;

9. failed to bring to the court's attention that jurors in Bell's trial conversed with jurors empaneled in the separate, simultaneous trial of another party charged with the same crime;

10. failed to bring to the court's attention that jurors in Bell's trial conversed with the mother of one of the victims during the trial; and

Bell also argues that his appellate counsel was ineffective because he failed to file a timely notice of appeal of the trial judge's denial of counsel's motion for a new trial. (Doc. 2, pp. 22-38). Respondent denies each of these contentions. (Doc. 8,20, 23).

OPINION

To state a claim for ineffective assistance of counsel, Bell must establish two factors: 1) the performance of trial counsel was deficient in that the errors made were

so serious that counsel was not functioning as the counsel guaranteed Bell by the sixth amendment; and 2) counsel's deficient performance resulted in prejudice so serious that the reliability of the trial result was undermined. *See Strickland v. Washington,* 466 U.S. 668, 687, *reh'g denied,* 467 U.S. 1267 (1984).

The Court must view counsel's acts or omissions in the context of all the circumstances of the case, and apply an objective standard of reasonableness to determine if counsel was deficient. *Id.* at 688, 690. Wide latitude must be given counsel in making tactical decisions, and Bell must overcome a strong presumption that counsel's performance falls within this wide range of reasonableness. *See id.* at 689.

To establish the requisite prejudice, Bell must show that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the trial would have been different. *See id.* at 694. The Court need not examine the question of whether counsel's performance was deficient before addressing the question of whether Bell was prejudiced by counsel's performance. The Court may dispose of an ineffective assistance of counsel claim by finding that Bell made an insufficient showing on either ground. *See id.* at 697.

I. Bell's Trial Counsel Was Not Deficient In His Preparation For Trial

Bell contends that he received ineffective assistance of trial counsel because several events indicate his counsel failed to adequately prepare for trial. These events include the fact that counsel did not move to quash the indictment which, according to Bell, was defective, and counsel did not request certain jury instructions. Bell argues that since the indictment charged him with aggravated murder and the jury instructions allowed the jury to convict him for aiding and abetting aggravated murder, counsel was ineffective when he failed to move to quash the indictment and failed to request certain

"limiting" jury instructions. (Doc. 2, pp. 22-24).

A. The Indictment Provided Bell With Adequate Notice Of The Aiding And Abetting Charge

An indictment is constitutionally defective under the fourteenth amendment if it fails to provide the person charged with adequate notice of the charges against him. *Watson v. Jago,* 558 F.2d 330, 338 (6th Cir. 1977). The Constitution does not require states to indict defendants by grand jury, and does not require states to use any specific indictment rule. *See Koontz v. Glossa,* 731 F.2d 365, 369 (6th Cir. 1984).

Once a grand jury returns an indictment, the prosecutor or the court may not expand it. *Id.* at 333; *United States v. Atisha,* 804 F.2d 920, 927 (6th Cir. 1986). When charging terms in the indictment have not been literally altered but the events at trial constructively alter the charges, a denial of defendant's rights under the Due Process Clause has occurred. *Stirone v. United States,* 361 U.S. 212 (1960). A constructive amendment occurs if "there has been a modification at trial in the elements of the crime charged." *Watson,* 558 F.2d at 334.

Bell's trial counsel did not err in failing to move to quash the indictment because the indictment was neither defective nor amended during trial. Although the indictment charged Bell with aggravated murder, in Ohio a defendant can be charged with complicity either in terms of complicity or in terms of the principal offense. Ohio Rev. Code Ann. §2923.03(F) (Anderson 1987) (effective Jan. 1, 1974). *See Hill v. E.P. Perini,* 788 F.2d 406 (6th Cir.), *cert. denied,* 479 U.S. 934 (1986). "This practice has apparently been established in Ohio for over 100 years." *Id.* at 407 (citing *Hanoff v. The State of Ohio,* 37 Ohio St. 178 (1881)). Since this was settled law in Ohio at the time of trial, Bell had notice through his attorney that the judge might instruct the jury on complicity. *Id.* at 408.

Bell states that his indictment was defective under *Watson*, and *United States v. Jones*, 647 F.2d 696 (6th Cir.), *cert. denied*, 454 U.S. 898 (1981), but presents no analysis supporting this conclusion. Neither *Watson* nor *Jones* is analogous to Bell's case.

Watson involved an indictment that was constructively amended from an original charge of first degree murder to a charge of felony murder. *Watson*, 558 F.2d at 338-39. Such an amendment vitally affected defense counsel's strategy at trial and caused a denial due process by failing to give defendant adequate notice of the charges against him. *Id.* at 336. The United States Court of Appeals for the Sixth Circuit has found a due process violation where a defendant was charged as a principal but the amended indictment charged the defendant with conspiracy. *Koontz v. Glossa*, 731 F.2d 365 (6th Cir. 1984). The Court reasoned that the amended indictment deprived defendant of an alibi defense and prevented him from having time to prepare an adequate defense. *Id.* at 370. Bell has not shown a similar type of harm in his case. He had adequate notice of the charge of complicity. *Supra* at 8-10. The record also shows counsel understood that the state's case was based on a complicity theory and that he defended Bell against the charge complicity.

In *Jones*, the defendant was denied his rights under the Due Process Clause because the federal indictment charged him with conspiring to construct an unregistered destructive device, but the court instructed the jury on conspiring to possess an unregistered destrictive device. *Jones*, 647 F.2d at 700. The Court determined that this was an impermissible material alteration of the indictment because Fed. R. Crim. P. 7(c)(1) required the government to include in the indictment a written statement of the charge of conspiracy. *Id.* However, Bell's case is not analogous to *Jones* because Bell's case does not involve two different conspiracy charges, but only the principal charge, of which Bell could be convicted as an aider and abettor. Furthermore, Ohio's method of giving Bell adequate notice of the charges is not controlled by Fed.

R. Crim. P. 7(c)(1). Therefore, Bell's assertion that *Jones* stands for reversal of his conviction lacks merit.

B. The Record Is Inadequate To Evaluate Bell's Arguments Concerning Counsel's Failure To Request Certain Jury Instructions

Bell argues that his trial counsel's failure to request "limiting" instructions resulted in jury confusion. He contends, "[t]he jury instructions allowed convictions for 'aiding and abetting,' 'a conspiracy' of if the defendants 'had a common purpose' . . . . The confusion from indictment to jury instructions is extraordinary. And yet much of this juror misguidance could have been avoided if [Bell's] counsel would have brought the landmark decision of *State v. Lockett,* 49 Ohio St.2d 48 (1976), *modified in part,* 438 U.S. 586 (1978), to the court's attention." (Doc. 2, p. 23).

The confusion throughout Bell's present counsel's arguments is extraordinary. This section of his memorandum (Doc. 2, pp. 22-24) is particularly discursive and poorly organized. We assume that counsel is arguing that trial counsel's alleged failure to request a *Lockett* instruction is a second ground on which he seeks to rest his inadequate trial preparation argument.

In *Lockett,* the defendant was convicted of aiding and abetting aggravated murder after an individual was killed during an armed robbery. The evidence indicated that the defendant was not present during the robbery but had entered into a common design to commit robbery and knew a deadly weapon would be used. The Ohio Supreme Court affirmed the conviction holding that the jury instructions were proper even though they allowed the jury to infer the existence of defendant's purpose to kill. *Lockett,* 49 Ohio St.2d at 67. This was so because the evidence established that there existed a common design between defendant and the principle; that the common design was to commit an act of force or violence; that the participants knew a deadly weapon would be

used; and that the participants sought to accomplish a felonious purpose. Under such circumstances, defendant's purpose to kill could be inferred since a death was the natural and probable result of the underlying scheme. *Id.* at 48-49 (syllabus ¶¶3-4).

It cannot be determind whether Bell's counsel requested instructions based on *Lockett* because the record does not contain the jury instructions requested by Bell's trial counsel.

II. Bell's Trial Counsel Was Not Deficient When He Failed To Use Certain Impeachment Materials

Bell argues that his trial counsel was ineffective because he failed to impeach Paul Callihan with certain audio tape recordings. When Bell was arrested, he and Callihan were incarcerated in the same jail. Callihan testified in the state's case-in-chief concerning remarks Bell had made in jail. Apparently, Bell's trial counsel surreptitiously recorded a conversation among himself, co-counsel, and Callihan during pretrial investigation. Bell contends that his counsel was ineffective because he lost the recording and as a result could not use it to impeach Callihan. (Doc. 2, pp. 24-25).

Bell also asserts that trial counsel was ineffective because he failed to impeach Reeder with his affidavit and with a audio tape recording of Reeder. He contends, "[i]n effect [trial counsel's] tactics reduced [Bell's] trial to a swearing contest between Reeder and [Bell]. Yet none of the exculpatory material was produced by [trial counsel]. Prior knowledge, actual intent, proof of intent or scheme or plan: all of the crucial elements necessary to ferret out the truth in [Bell's] cause were reduced to a shambles by the ineffective assistance of counsel . . . . In essence, [trial counsel] decided to do nothing concerning [Bell's] only defense." *Id.* Bell submitted an unidentified tape with his petition.

Bell fails to allege the contents of either tape recording and he fails to demonstrate how the recordings would have impeached Callihan and Reeder. In the absence of any information as to the substance of the recorded conversations, it is impossible to conclude that Bell's trial counsel was ineffective when he did not use the recordings as impeachment material. Moreover, although Bell submitted a tape recording with his petition, he has not attempted to establish that the recording is authentic, or that any of the recordings mentioned could have been authenticated at trial. Therefore, he has not established that trial counsel was deficient by failing to impeach Callihan and Reeder by use of the recordings.

As regards the affidavit of Reeder, Bell argues that his trial counsel was ineffective when he did not impeach Reeder with the following portions of Reeder's affidavit:

> At no time before the shooting did [Bell] or myself have any idea that Dave Gambill was going to shoot the girls . . . . At no time did Jim Bell ever threaten either of the girls with the gun.
>
> When [Bell] handed [Gambill] the gun he had no idea what [Gambill] intended. [Gambill] seemed to want the gun only because it was his and he wanted it back. At that point [Gambill] had done nothing to show he intended to shoot anyone.

Doc. 2, at 25 (quoting Reeder's Aff. at 2-3). This portion of Reeder's affidavit does not conflict with Reeder's trial testimony. The record indicates that Bell's counsel elicited testimony favorable to Bell on cross-examination of Reeder during the state's case-in-chief and on direct examination of Reeder during Bell's case-in-chief. (Tr. 225-42). Reeder admitted on cross-examination that he wanted to go to the trailer on the night of the murders to see a woman he had once dated. If the jury believed this statement, they could have concluded that Bell did not aid and abet the murders since it tends to show the

existence of a plausible, innocent explanation why the group went to the trailer. Reeder also testified that he was with Bell from Sunday until the time of the killings on Tuesday evening; that Bell never said he wanted to kill Kennard or Coleman; that Bell never threatened to kill Kennard or Coleman; that when Gambill started arguing with Donna Kennard, Bell just "shut up;" that Bell was not present when the victims' bodies were abused; that Bell never threatened or tried to kill anyone; and that Bell never intended, planned, or conspired to kill Kennard or Coleman. (Tr. 249-256). Reeder also stated that Bell told him, "I wish to God Gambill hadn't killed those girls." (Tr. 369). Reeder also stated that Bell could have pointed the gun at Kennard only when-at Gambill's insistence-Bell handed the gun to Gambill. Id. Because much of Reeder's testimony showed Bell in a favorable light, a decision not to impeach him with the alleged recording and affidavit was well within appropriate trial strategy.

Bell argues that he was denied effective assistance of counsel in a manner similar to that found in *Wilson v. Cowan*, 578 F.2d 166 (6th Cir. 1989). In *Wilson* the Court found trial counsel ineffective because counsel failed to call an alibi witness, thus depriving the defendant of his only defense. *Id.* at 168. In contrast, the alleged failure to impeach Reeder did not deprive Bell of his only defense. The presence of Bell at the scene of the murder seriously limited the number of options available to his trial counsel. By choosing not to impeach Reeder, Bell's counsel preserved favorable testimony concerning Bell's actions before, during, and after the murders. Thus, trial counsel's decision not to impeach Reeder was a reasonable tactical decision under the circumstances.

III. Bell's Trial Counsel Did Not Commit Error By Failing To Call David Gambill, Gambill's Mother, Or Gambill's Step-Father.

Bell asserts that "one would have to presume ineffective assistance [of counsel] not to call Dave Gambill [as a witness], the one person everyone knew had killed the

girls." (Doc. 2, p. 27). He points to the fact that Gambill subpoenaed Bell to Gambill's trial as "indicative of competent counsel." *Id.* at 28. He also argues that the affidavits of Bell's parents (Charles Bell and Clara Bell) clearly show that Gambill's mother and step-father "would have been called by competent counsel." *Id.* at 27.

Bell has not submitted to this Court evidence indicating his trial counsel had any information regarding Gambill's willingness to testify favorably to Bell, or that Gambill had given Bell's trial counsel information that would have exculpated Bell. The record also lacks any indication that Gambill told Bell's trial counsel he would not invoke his fifth amendment right to remain silent if called as a witness at Bell's trial. The decision by Gambill's attorney to call Bell at Gambill's trial is irrelevant to the analysis of whether Bell's trial counsel committed error by failing to call Gambill as a witness in Bell's trial. The myriad of factors entering an attorney's decision of which witnesses to call during a trial cannot render a decision by an attorney in the trial of an alleged murderer applicable to the decision of another attorney in a separate trial of an alleged aider and abettor. In Bell's case a reasonable attorney could have concluded that it was sound strategy not to call Gambill as a witness. A reasonable attorney would want to minimize any association between Gambill and Bell, particularly in light of the brutal acts Gambill committed on the night of the murders. *Supra* at 4. Furthermore, Bell presents no evidence indicating that Gambill's testimony would have exculpated him at trial. The affidavit of Gambill submitted in support of Bell's petition merely contains Gambill's version of the events. It does not contain any statement that Gambill would have testified to these events at Bell's trial. Even assuming that the affidavit contains Gambill's proposed testimony and that the jury would have believed such testimony, it merely would have corroborated existing evidence favorable to Bell; it did not provide any new evidence for the jury to consider and it did not provide facts that alone were capable of exculpating Bell. Thus, trial counsel's decision

not to call Gambill as a witness was not deficient performance.

Bell argues that his counsel was ineffective in failing to call Gambill's mother and step-father as witnesses, because they could have testified to statements made by Gambill during a prison visit soon after Gambill's arrest. He bases this argument on the affidavit of Charles Bell, who heard Gambill tell his parents that "he wanted to confess because James Bell had nothing to do with the deaths." (Doc. 2; Aff. Charles Bell, ¶23(E)). Bell relies heavily on *United States v. Cronic,* 466 U.S. 648 (1984) and *United States ex rel. Cosey v. Wolf,* 562 F.Supp. 140 (N.D. Ill.), *aff'd,* 727 F.2d 656 (1983), to support this argument. He asserts that trial counsel's failure to all these witnesses establishes "the prosecution's cases was simply not subjected to any 'meaningful adversary testing,' creating a situation that makes the adversary process itself presumptively unreliable." (Doc. 2; p. 29, citing *Cronic,* [466 U.S. at 659-60]).

Bell has failed to establish that trial counsel's decision not to call Gambill's parents was deficient because he failed to support his argument with evidence indicating that his counsel knew about the information they supposedly possessed at the time of the trial. Similarly, Bell has failed to establish that his counsel knew Gambill's parents would have testified in a manner favorable to Bell even though such testimony would have been unfavorable to their own son. Furthermore, since the statements Gambill allegedly made to his parents constitute apparent hearsay. *See* Ohio R. Evid. 801-802, Bell has failed to show that the statements would have been admitted into evidence. Bell has also failed to even attempt to argue that he was prejudiced by the absence of Gambill's parents. Therefore, he has failed to establish that his counsel provided him with ineffective assistance on this issue.

IV. Bell's Assertion That The "Multiplicity Of Additional Errors" Committed By Trial Counsel Constitued Ineffective Assistance of Counsel Lacks Merit

Bell's current counsel organizes his next set of arguments in a confusing manner. He begins by referring to the affidavit of Charles Bell to support the assertion that Bell's trial counsel knew of the existence of a video tape recording of Reeder allegedly made by the Scioto County Prosecutor, and rehetorically states, "[o]ne wonders why no pursuit of the [video] tapes seems to have been made." (Doc. 2, p. 29). He alleges that the recording contains Reeder's statement, made under oath, that he heard Bell tell one of the victims that he did not intend to hurt her.

Bell's trial counsel was not deficient in failing to pursue the video tape recording because Reeder's trial testimony contained statements similar to those allegedly on the recording. During Bell's counsel cross-examination of Reeder, the following colloquy took place:

> [Q]: Did you ever hear Jim Bell say anything about wanting to kill either one of those girls?
>
> [A]: No.
>
> [Q]: Did you ever hear him say anything about going to the trailer for any purpose of harming the girls?
>
> [A]: No.
>
> [Q]: Did you ever hear Jimmy Bell threaten Donna's life or Debbie's life?
>
> [A]: No.

Tr. 249-50. Thus, Bell has failed to establish that trial counsel was deficient by not pursuing the video recording of Reeder.

Next, Bell's habeas counsel presents a list of eleven rhetorical questions. (Doc. 2, pp. 30-31). Although this is not an appropriate method of bringing an issue to the attention of the Court, we have given Bell the benefit of the doubt by interpreting from these questions issues relating to his claim of ineffective assistance of counsel.

A. Bell's Counsel Was Not Deficient By Declining To Request A Jury Instruction On Withdrawal, Negligent Homicide, Or Failure To Secure A Dangerous Ordinance

Bell contends that the following conversation between the trial judge and Bell's trial counsel establishes that trial counsel was deficient when he did not request a jury instruction on withdrawal.

> [Bell's counsel]: I really see no issue of withdrawal in the case, Judge.
>
> [The Court]: Is it your request the Court not instruct the jury on withdrawal?
>
> [Bell's counsel]: We would request that the Court not instruct on withdrawal.

Tr. 354-55.

> [The Court]: You can think about withdrawal and let me know tomorrow.

Tr. 357.

Bell also argues that "[t]he undisputed testimony of the case demonstrates competent counsel would not have waived a withdrawal instruction. Further, had appropriate discussion with the client taken place *it is inconceivable that all lesser included instructions would have been wavied by counsel* in the present situation." (Doc. 2, p. 34, emphasis in original).

These arguments lack merit. The fact that the trial judge gave counsel time to think about requesting a withdrawal instruction does not establish counsel was deficient when he did not request this type of instruction. In Ohio, "[i]t is an affirmative defense to a charge [of complicity] that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under the circumstances manifesting a complete and voluntary renunciation of his criminal purpose." Ohio Rev. Code Ann. §2923.03(E) (Anderson 1987)(effective Jan. 1, 1974). An instruction on renunciation would be given only if there was evidence admitted during trial that tended to prove Bell voluntarily renounced his criminal purpose. Once the jury found that Bell was involved in complicity to commit aggravated murder, no evidence whatsoever existed from which the jury could have concluded Bell completely and voluntarily renounced his complicity. Therefore trial counsel was not deficient when he declined to request a withdrawal instruction.

Bell further argues that trial counsel was ineffective because he did not request jury instructions on two misdemeanors: negligent homicide, Ohio Rev. Code Ann. §2903.05 (Anderson 1987) (effective Jan. 1, 1974), and failure to secure a dangerous ordinance, Ohio Rev. Code Ann. §2923.19 (Anderson 1987) (effective Jan. 1, 1974). He argues, "[I]t is utterly inconceivable that one charged with offenses which can result in *multiple consecutive life sentences* would refuse lesser included misdemeanor instructions if consulted on 'possible approaches to the case' [sic] . . . *where the defendant admits he handed a gun to the person who killed [Kennard and Coleman].*" (Doc. 2, p. 34, emphasis in original) (citing *State v. Jenkins,* 15 Ohio St.3d 164, 218 (1984), *reh'g denied,* 472 U.S. 1032 (1985); *State v. Nolton,* 19 Ohio St.2d 133 (1969); and *Gaines v. Hopper,* 430 F.Supp. 1173 (M.D. Ga.), *aff'd* 575 F.2d 1147 (5th Cir. 1978)).

Generally, a trial court does not committ error cognizable in a habeas corpus action by failing to give an unrequested lesser included offense instruction. *Pilon*

v. Bordenkircher, 593 F.2d 264, 267 (6th Cir. 1979).

Bell's counsel's decision not to request lesser included offense instructions was reasonable under Ohio law. At the time of Bell's trial, (April 16, 1978), Ohio law permitted a jury to convict a defendant of a lesser included offense. *See* Ohio Rev. Code Ann. §2945.74 (Anderson 1987) (effective Jan 1, 1974); Ohio R. Crim. P. 31(c) (Anderson 1987); *State v. Washington*, 56 Ohio App.2d 129, 139 (Ct. App. 1978). An offense was a lesser included offense under Ohio law if all the elements of the lesser offense plus other elements constituted the charged offense. *Stacy v. Van Curen*, 432 F.2d 970, 971 (6th Cir. 1978), (citing *State v. Kuchmak*, 159 Ohio St. 363, 366-67 (1953), and *State v. Hreno*, 162 Ohio St. 193 (1954)).

In 1979, the test for determining whether an Ohio jury must be given a lesser included offense instruction involved a two-part analysis: first, if defendant produced evidence which established a complete defense to all the substantive elements of the principal offense (eg., self defense), then the court would not instruct the jury on any lesser included offense; second, if the jury could reasonably find for the defendant on any element of the principal offense, but could find against the defendant on the elements of a lesser included offense, then the jury must be instructed on the lesser included offense. *Nolton*, 19 Ohio St.2d at 135.

The issue of whether negligent homicide was a lesser included offense of aggravated murder was unsettled in Ohio at the time of Bell's trial.[1] Assuming, *arguendo*, that negligent homicide was a lesser included offense of aggravated murder, Bell's counsel did not err by failing to request an instruction on negligent homicide. There was no basis in the evidence for the jury to have found

[1] Under modern Ohio law negligent homicide is a lesser included offense of aggravated murder. *State v. Thomas*, 40 Ohio St.3d 213 (1988).

Bell guilty of negligent homicide. *See State v. Thomas*, 40 Ohio St.3d 213, 215-17 (1988). A person is guilty of negligent homicide when he "negligently cause[s] the death of another by means of a deadly weapon or dangerous ordinance." O.R.C. §2903.05(A). Construing the evidence in Bell's favor, there are not facts indicating he negligently caused the deaths of Kennard and Coleman. Gambill caused the deaths by shooting the women after Bell handed him the revolver. Because Gambill's act was not negligent homicide, Bell could not be convicted of aiding and abetting negligent homicide. Therefore, in the absence of facts supporting the elements of negligent homicide, the jury could not have reasonably found Bell guilty of negligent homicide.

Failure to secure a dangerous ordinance is not a lesser included offense of complicity to commit aggravated murder. The doctrine of lesser included offenses relates only to offenses of the same general type, not to distinct offenses of a different class. *Kuchmak*, 159 Ohio St. at 368. Since the acts comprising complicity to commit aggravated murder are wholly different from the acts comprising failure to secure a dangerous ordinance, the latter is not a lesser included offense of the former. *See id;* compare O.R.C. §2903.10 and O.R.C. §2923.03 *with* O.R.C. §2923.19.

In addition, it was a reasonable strategy for counsel not to request instructions on either failure to secure a dangerous ordinance or negligent homicide. There is support in the record that counsel did not request lesser included offense instructions as part of his trial strategy since counsel specifically requested the court not give instructions on any lesser included offense or withdrawal. (Tr. 460-61). It was a reasonable trial strategy for counsel to avoid exposing Bell to convictions on other offenses, especially if counsel determined after hearing all the testimony and viewing the demeanor of each witness, that the evidence favored Bell's acquittal.

B. Counsel's Decision Not To Adduce Evidence Of Gambill's Drug Use Was Not Ineffective Assistance Of Counsel

In another rhetorical question Bell's habeas counsel asks: "What heavy deference ought to be given the decision not to adduce evidence of Gambill's use of LSD as the reason for the murders?" Gambill admits in his affidavit that he had taken "acid" on the night of the murders. (Doc. 2, Aff. Gambill, p. 1).

Trial counsel's decision concerning which evidence to present during trial is particularly susceptible to the problem of second guessing in the relative calm of habeas review. Therefore, ineffective-assistance analysis should be highly deferential on this issue. *See Strickland,* 466 U.S. at 689.

Trial counsel's decision not to present evidence of Gambill's drug use on the night of the murder was not deficient performance. The fact that Gambill took drugs on the night of the murders does not by itself exculpate Bell. The only possible benefit to presenting such evidence to the jury is Bell's assertion that it tended to show that Bell, Gambill, and Reeder went to the trailer "to party" with Kennard and Coleman, not to kill them. In contrast, the many negative implications connected with drug use in our society cautioned against trial counsel presenting evidence which associated Bell with drugs or drug users. Moreover, trial counsel provided other evidence, such as Reeder's testimony, supporting the theory that Bell, Gambill, and Reeder went to the trailer to enjoy the companionship of Kennard and Coleman.

Bell has also failed to present any evidence tending to show that his trial counsel knew of Gambill's drug use at the time of the trial. Therefore Bell has not established that his trial counsel's performance was deficient on this issue.

Lastly, Bell has neither argued nor demonstrated that any prejudice occurred because of trial counsel's decision not to adduce evidence of Gambill's drug use. Thus, trial counsel's decision not to use this evidence was not ineffective assistance of counsel.

C. Bell Was Not Provided With Ineffective Assistance of Counsel At Sentencing

Bell next asks, "What heavy deference ought to be given counsel's advice that [Bell] say nothing in mitigation at his sentencing?" (Doc. 2, p. 31).

Bell has failed to provide any evidence, other than his own statement, that his trial counsel advised him to remain silent during his sentencing. He has also failed to present any argument in support of his conclusion that counsel's advice during sentencing was deficient performance or that the outcome of sentencing was affected by counsel's advice.

Immediately following the verdict, the jury was polled. The judge then asked Bell if he wished to make any statement before sentencing. The transcript does not indicate that Bell conversed with his trial counsel at this point. Bell simply responded negatively and the judge imposed two consecutive life sentences. (Tr. 479-82). Therefore, there is no evidence to support Bell's assertion that trial counsel advised him to remain silent during his sentencing.

Assuming, *arguendo,* that Bell's counsel did advise him to remain silent during sentencing, there is no indication of what he would have told the judge had he been permitted to speak. There is also no evidence showing that Bell was remorseful, that he would have improved his credibility, or that he would have added any statements in mitigation that he omitted from his testimony during the trial.

Lastly, the severity of the sentencing does not by itself establish that, but for counsel's advise, Bell would have received a lesser sentence. Therefore, Bell has not established that counsel was either deficient or that he was prejudiced by counsel's advice during his sentencing.

D. Statements Made By Bell's Counsel During Voir Dire Did Not Constitute Ineffective Assistance of Counsel

Bell contends that his trial counsel failed to obtain an impartial jury because he allowed a juror to remain on the panel who admitted she had a preconceived opinion of guilt, and because he allowed another juror to remain on the panel who responded "I guess" when asked whether she would presume Bell was innocent until proven guilty beyond a reasonable doubt. (Doc. 2, p. 30, q. 1, 3).

The constitutional right to a jury trial guarantees a defendant the right to an impartial jury. *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). Jurors are not required to be ignorant of the facts involved in the case and can have preconceived notions of guilty or innocence. *Id.* at 722-23. However, if a petitioner in a habeas proceeding shows that the strength of a juror's opinion indicates the juror has formed a positive and decided opinion, then a presumption of partiality exists. *Id.* at 723. Since "[impartiality] is a state of mind," *id.* at 724 (quoting *United States v. Woods,* 299 U.S. 123, 145-46 (1936)), and since no technical formula or test exists for federal courts to apply when determining if a particular juror was impartial, a trial court's finding of impartiality should be set aside only where prejudice is manifest. *Id.* at 723 (quoting *Reynolds v. United States,* 98 U.S. 145, 156 (1878)).

Bell seems to attack trial counsel's voir dire of Mrs. Sullmans. (Doc. 2, p. 30, q. 3 (citing Tr. 26)). Mrs. Sullmans admitted that it would be difficult for her to evaluate the case only on the evidence presented during trial. (Tr. 17-19). Bell's counsel requested that she be excused for

cause, but the court, after further questioning, did not excuse her. (Tr. 19-20). When the court gave the state the opportunity to exercise its first peremptory challenge, it challenged Mrs. Sullmans, and she was excused. (Tr. 58). Since this juror was eventually excused, counsel's performance in regard to her could not have been ineffective.

Bell also challenges his trial counsel's voir dire of Mrs. Bloomfield, during which the following colloquy then took place:

> [Bell's counsel]: Is there anything in the fact that [Bell was] indicted that would cause you to form an opinion one way or another as to his guilt?
>
> [Mrs. Bloomfield]: I thought so before I [came] in here, but I've changed.
>
> * * *
>
> [Bell's counsel]: *I know that everybody in this community, including my mother, thinks or had an opinion that [Bell is guilty].* My question to you is, can you lay that aside completely and presume that Jim is innocent unless he is proven guilty by evidence in this Courtroom beyond a reasonable doubt.
>
> [Mrs. Bloomfield]: I think I could.

(Tr. 62-63) (emphasis added).

Mrs. Bloomfield did not disqualify herself by providing these answers because neither the answers nor her voir dire testimony as a whole establish that she possessed a positive and decided opinion of Bell's guilt or innocence. *See Murphy v. Florida,* 421 U.S. 794, 800 (1975); *Irvin,* 366 U.S. at 723. During the court's voir dire of Mrs. Bloomfield, she specifically stated that even though she had heard people talking about the case, she had not formed an

opinion regarding Bell's guilt or innocence. (Tr. 60). Although Mrs. Bloomfield's later answers (Tr. 62-63) were ambiguous, she did not indicate that she possessed a preconceived opinion of Bell's guilt or innocence. Mrs. Bloomfield also stated that there was nothing in her background which would prevent her from being a fair and impartial juror, (Tr. 58), and that she did not know Bell, Gambill, or the victims. (Tr. 58-59). In the absence of any clearly disqualifying remarks by Mrs. Bloomfield, her unequivocal statements indicating her impartiality established that she was an impartial juror. *See Murphy,* 421 U.S. at 800; *Irvin,* 366 U.S. at 723. Bell's counsel acted reasonably by not challenging this apparently impartial juror. *Cf. id.; Strickland,* 466 U.S. at 687-97.

Trial counsel's comment that "everybody in the community thinks Bell is guilty . . . " (Tr. 63), when taken out of context, seems prejudicial to Bell. However, the comment was made during counsel's exploration of the possibility of bias underlying Mrs. Bloomfield's statement that she had been the victim of a crime. (Tr. 62-63). As such the comment fit within counsel's overall voir dire strategy to acknowledge both the brutal nature of the crimes and any public sentiment against Bell. *See infra* at 27-28.

Bell also challenges his counsel's emphasis on the brutal nature of the crime. (Doc. 2, p. 30, q.4).[2]

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[2] During voir dire counsel made the following remarks:

> Is there anyone here . . . that hasn't heard about this terrible killing of these two girls out here . . . Now, is there anything in that publicity alone or the terrible nature of that crime—and it was one of the most tragic things that's occurred in Scioto County in my memory—is there anything that that [sic] would cause you to form an opinion or makeup your mind in advance that Jim Bell is guilty of that murder?

Tr. 16

> Now, Mr. Wagner, Jim Bell is charged with one of the most vicious horrible crimes that has happened in Scioto County. There's no way of getting around that fact. And, if he did it, if he is guilty, he deserves to be convicted. He does, there's no doubt about that. The person that murdered those girls deserves the most the law can give him. Is there anything just in that fact alone, the fact that this was such a blatantly horrible crime that would cause you to think, "well, if he's accused of this, let's put it to him?"

Tr. 40.

> [I]f after you have heard all of the evidence you have a reasonable doubt as to [Bell's] guilt, then it is your sworn duty to return a verdict of not guilty. And that is hard. Because after this case is over, if Jim Bell is found not guilty, everybody that you know will come up to you and say, "boy, you let that killer go, didn't you." And they'll walk up to me and say, "how did you get that guy off" . . . ?

Tr. 41.

> Is there anything in just the nature of the offense that [it] was one of the most tragic, horrible brutal slayings that's happened in Scioto County, that would cause you to automatically start off against anyone who's just accused of it?

Tr. 43.

> Miss Marsh, this crime is one of the worst crimes that's ever happened here in Scioto County, it's one of the most tragic killings; and the person who did it deserves to be punished to the fullest extent of the law. Is there anything in just the fact that this crime is so horrible that would cause you to start off against Jim Bell?
>
> * * *
>
> In other words, if the evidence doesn't prove that Jim Bell is guilty, just because this crime is so terrible, you wouldn't feel because this crime is so terrible you'd destroy this young man's life anyway; is that right?

Tr. 53.

> You know that this is one of the most horrible crimes that's ever been committed in this county . . . Is there anything in the fact [that Bell has] been indicted that would cause you [to] form an opinion one way or another as to his guilt?

Tr. 62.

> And Jim Bell is accused of one of the most terrible, horrible, shocking crimes that's happened here in Scioto County, Mr. McKane . . . . But the mere fact the crime was so terrible and Jim Bell is accused of it, wouldn't cause you to start off feeling he did it and make him prove he is innocent, would it?

Tr. 67-68

> And the evidence in this case is what Jim Bell is entitled to be judged on . . . . And the thing that disturbs me, the thing that scares me to death, is public opinion. That is the monster that is looming over our heads here, over all of our heads today. If you are selected as a juror, Mr. Jordan, you will take an oath to base your decision on the evidence and the evidence alone. Can you do that?

Tr. 76.

> [I]f you find that . . . there is a reasonable doubt as to whether or not Jim Bell knowingly and purposely caused the death of anyone, then it is your sworn duty to return a verdict of not guilty. And if you do that, whenever you go back out here among the public who have circulated different rumors about [Bell], they're gonna say, "boy, oh boy, why did you do that?" So, my question is, would you . . . lay aside public opinion of what somebody might think of you if you have to return a verdict of not guilty . . . ?

Tr. 80.

> I'm sure you have read about this horrible crime?

Tr. 82.

> Mrs. Evans, I could tell by your answers that you, like all of us, have heard about this tragic and one of the most

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shocking crimes committed here [sic]?

> * * *
>
> Now, my question is, is it just because this crime was so horrible, so tragic and so forth to all of us, would that cause you to take the attitude that blood must roll for that, and we won't really pay too much attention to whether or not they prove a person is guilty, and that just because it was so bad somebody must pay?

Tr. 87

Bell rhetorically asks, "[w]hat heavy deference ought to be given numerous statements by [trial] counsel that the crime is vicious and horrible and the [sic] should be convicted if proven guilty? (Doc. 2, p.30, q.5). By merely posing this question, Bell has not established that his counsel was ineffective when he made these comments because he has failed to argue that the comments constituted deficient performance and that such performance prejudiced him. *See Strickland,* 466 U.S. at 687-97. However, since the comments themselves were capable of destroying the presumption of jury impartiality, *cf. Irvin,* 366 U.S. at 723-24, we will analyze the voir dire as a whole to determine if Bell was provided with ineffective assistance of counsel.

Since Bell framed his challenge to counsel's performance during voir dire in a general manner, we must infer he is arguing that his counsel was ineffective because his comments created an atmosphere prejudicial to Bell, which caused an impartial jury to be impanelled. In order for Bell to succeed in showing that counsel was ineffective in this manner, he must first present evidence tending to show that a neutral, non-prejudical atmosphere existed in the community and in the courtroom prior to voir dire, which was then destroyed by the remarks of Bell's trial counsel. Bell has offered no evidence indicating that a neutral, non-prejudicial atmosphere existed in the community at the time of the trial. The transcript shows that the trial court denied his counsel's motion for a

change in venue after empanelling the jury. (Tr. 97). It can be inferred from the presence of such a motion that trial counsel believed community feeling was antagonistic toward Bell, and thus he pursued an effort to locate the trial in a more neutral community. It was then reasonable for counsel to acknowledge existing community sentiment and attempt to defuse it. In the absence of evidence to the contrary, there is no reason to conclude that trial counsel's performance during voir dire created an atmosphere unfavorable to Bell that did not already exist or that counsel's remarks constituted ineffective assistance by poisoning an impartial jury. *See Murphy,* 421 U.S. at 799-803 (1975); *Irvin,* 366 U.S. at 724. Although the remarks may have been improper if made by the prosecuting attorney, under the circumstances of this case, they fall within the wide range of reasonable professional assistance. *See Strickland,* 466 U.S. at 689. Bell has not overcome the presumption that the remarks "might be considered sound trial strategy." *Strickland,* 466 U.S. at 189 (quoting *Michel v. Loiusiana,* [sic] 350 U.S. 91, 101 (1955). As a result, Bell has failed to establish that his counsel provided him with constitutionally ineffective assistance during voir dire. *See Strickland,* 466 U.S. at 687-697.

V. The Jury Instructions Violated Bell's Rights Under The Due Process Clause And Bell's Counsel Provided Ineffective Assistance By Failing To Object To The Jury Instructions

Bell argues that his trial counsel provided ineffective assistance by failing to object to the jury instructions because the instructions violated his rights under the Due Process Clause. (Doc. 2, pp. 33-37). Bell also appears to challenge the jury instructions directly, claiming a Due Process violation. We discuss both claims below.

A. The Jury Instructions Violated Bell's Rights Under The Due Process Clause

The jury instructions deprived Bell of his rights under

the Due Process Clause by relieving the state of its burden of proving a critical element of the charged offense: Bell's purpose to kill. *See Sandstrom v. Montana*, 442 U.S. 509 (1979). The court instructed, in pertinent part:

> *If you find that David L. Gambill formed a purpose to kill and that this purpose was arrived at with prior calculation and design before he performed the act, this is sufficent for this element of the crime.*
>
> Purpose to kill is the second element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. *It must be established in this case that at the time in question there was in the mind of David L. Gambill a specific intention to kill Donna Jean Kennard and Deborah Renee Coleman.*

Tr. 467-68 (emphasis added).

Earlier the court had instructed:

> In the absence of a conspiracy, one may not be held as a principal, if he is merely present during the commission of a crime where he has not procured, encouraged or participated in such crime. Also, in the absence of a conspiracy or some preceding connection with the transaction, one does not aid and abet if he merely sees a crime being committed. However, if you find that the defendant and David L. Gambill entered into a conspiracy or had a common purpose or design to commit an unlawful act, such as attempting to obtain money by means of threats or violence, a different rule applies. The aider and abettor is criminally responsible for any act done in furtherance of the common criminal enterprise whether intended by him or not, if such act might have been reasonably contemplated by him as probable or likely to result from an attempt to

> commit the crime intended. Or, as otherwise stated, he is bound by the consequences naturally or probably arising in its furtherance and, in case of death, he is guilty of homicide. Each is responsible for everything done by his confederate which follows incidentially in the execution of the common design as one of its probable or natural consequences even though it was not intended as a part of the original plan or common plan.

Tr. 465-66.

The Due Process Clause of the fourteenth amendment requires a state to prove beyond a reasonable doubt every fact necessary to constitute the charged offense. *In re Winship*, 397 U.S. 357, 364 (1970). The reasonable doubt standard applies to each element of a criminal offense in order to minimize the possibility of any fact-finding errors and to ensure that a state incarcerates only the guilty. *See id* at 363-65. The trial court may not instruct a jury in a manner that shifts to a defendant the burden or proving a critical fact in dispute not only because this violates a defendant's right to the presumption of innocence, but also because it increases the likelihood of an erroneous conviction. *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975). Where intent is an element of the charged offense, the court may not instruct a jury that the existence of certain facts automatically establishes the element of intent. *Sandstrom*, 442 U.S. at 521-23 (quoting *Morissette v. United States*, 342 U.S. 246, 274-75 (1952)). A jury instruction that creates such a mandatory presumption offends the Due Process Clause because it relieves the state of its burden of proof on an essential element of the charged offense. *Id.*

In order to determine whether the jury instructions violated Bell's rights under the Due Process Clause, the challenged language must be analyzed in two parts. First, did the language actually spoken to the jury create a mandatory factual presumption or merely a permissive

inference? Second, if the particular language created a mandatory presumption, then did the jury instructions as a whole explain the challenged language so that a reasonable juror could not have concluded he or she was required to presume the truth of the fact? *Francis v. Franklin*, 471 U.S. 307, 314-15 (1985) (citations omitted).

At the time of Bell's trial, Ohio's complicity statute provided, in pertinent part:

> (A) No person, *acting with the kind of culpability required for the commission of an offense*, shall do any of the following:
> * * *
> (2) Aid or abet another in committing the offense.

Ohio Rev. Code §2923.03 (Anderson 1987) (effective Jan. 1, 1974) (emphasis added).

Ohio's aggravated murder statute provided in pertinent part:

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.
>
> (B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary or escape.

Ohio Rev. Code §2903.01(Anderson 1987)(effective Jan. 1, 1974).

The culpability language of Ohio's complicity statute, when applied to the offense of aggravated murder, required the state to prove that Bell possessed a purpose

to kill in order to obtain a conviction for aiding and abetting aggravated murder. *See Clark v. Jago*, 676 F.2d 1099, 1103-04 (6th Cir. 1982). Although Ohio's aggravated murder statute was unusual in that it required the state to prove a defendant's purpose to kill even when it proceeded on a felony-murder theory, *Lockett*, 49 Ohio St. 2d at 58-59, the state's burden of proving a defendant's purpose to kill was eased somewhat by the Ohio Supreme Court's approval of the use of inferences in limited circumstances. *See id.* at 48-49 (syllabus ¶¶3-4). In *Lockett*, the Ohio Supreme Court approved instructions that allowed a jury to infer an aider and abettor's purpose to kill when the facts surrounding the commission of an armed robbery established that the participants entered into a common design to commit an armed robbery "by the use of force [or] violence . . . and all participants were aware that an inherently dangerous instrumentality was to be employed . . . ," because a murder resulting from such circumstances was a natural and probable consequence of the common plan. *Id.* Therefore, the state in the instant case could attempt to prove Bell's purpose to kill either by producing evidence that supported the existence of a *Lockett*-type inference or by other proof of Bell's intent. *See Clark*, 676 F.2d at 1105; *Lockett*, 49 Ohio St. 2d at 58-59; Cf. Ohio Rev. Code §2901.22(A) (Anderson 1987)(effective Jan. 1, 1974).

The trial court committed two errors in Bell's case when attempting to instruct the jury on the intent element of aiding and abetting aggravated murder. The more egregious error occurred when the court instructed the jury that the existence of Bell's purpose to kill was established if the jury found Gambill alone possessed a purpose to kill Kennard and Coleman. *See supra* at 28-29; *Clark*, 676 F.2d at 1103-04. Although the court did not employ the term "presumption," the substance of this portion of the instructions violated the principles of *Sandstrom* because it relieved the state of its burden of proving Bell's purpose to kill. Where a jury instruction on aiding and abetting aggravated murder allows the jury to find the defendant's purpose to kill in the mind of his

accomplice, the Due Process Clause is violated. *Clark*, 676 F.2d at 1104. The instructions in the instant case allowed Bell's jury to find his purpose to kill solely in the mind of Gambill, thus violating the Due Process Clause.

The trial court also erred in its apparent attempt to instruct the jury in compliance with *Lockett*. (Tr. 465-66; *supra* at 28-29). The court's careless use of the term "conspiracy" along with its use of such phrases as "some preceding connection" and "common purpose or design" was too general. The court never explained that in order to give rise to an inference of Bell's purpose to kill, the jury must first find the existence of specific facts connecting Bell to an underlying agreement to use a dangerous instrumentality to accomplish a felonious purpose. *See Lockett*, 49 Ohio St. 2d at 48 (syllabus ¶ ¶3-4). A more appropriate *Lockett* instruction would have required the jury to find the following before they could return a guilty verdict: 1) that among the participants there existed a common design; 2) that the common design was to commit and act of force or violence; 3) that the participants knew a deadly instrumentality would be used; and 4) that the participants sought to accomplish a felonious purpose. *See id.* If Bell's jury had determined that the state proved such facts beyond a reasonable doubt, then an inference of Bell's purpose to kill would have been permissible since a death under such circumstances would have been a natural and probable consequence of the felonious undertaking. *See id.* However, the court referred to one possible common purpose as "attempting to obtain money by means of threats or violence . . . " (Tr. 465-66; *supra* at 29). This reference did not fully explain the circumstances from which the jury was entitled to infer that Bell possessed a purpose to kill. *See State v. Scott*, 61 Ohio St.2d 155, 166 (1980).

The Ohio Court of Appeals in dicta stated that the instructions "essentially incorporated [the *Lockett*] concept[s]." (Doc. 8, Ex. E at 8-9). Ordinarily an intermediate state court's published ruling is binding on

a federal court in a habeas corpus proceeding where the state's highest court has not spoken. *Olsen v. McFaul,* 843 F.2d 918, 929 (6th Cir. 1988). An unpublished decision containing dicta that misapplies state law, however, is not binding on a federal court when it is convinced that the state's highest court would rule otherwise. *Id; Pryor v. Rose,* 724 F.2d 525, 528 (6th Cir. 1984) (citing *Marshall v. Lonberger,* 459 U.S. 422 (1983); *Sumner v. Mata,* 449 U.S. 591 (1981)). In Bell's case a full analysis of the trial court's apparent attempt to instruct in compliance with *Lockett* shows that the court misapplied Ohio law. *Supra* at 32-33. In light of this error, the Ohio Supreme Court would not have approved the Court of Appeals' dicta. *See id.; Lockett,* 49 Ohio St.2d at 48 (syllabus ¶¶3-4). Although this error in the application of state law does not by itself establish that the instructions violated the principles of *Sandstrom,* when combined with the instructions given that closely followed, which unequivocally permitted the jury to substitute a finding of Gambill's intent for that of Bell, the instructions resulted in eliminating the state's burden of proving Bell's purpose to kill. As a result, the instructions violated the principles of *Sandstrom.*

The record reveals that the jury was concerned with the elements of aiding and abetting. After deliberating for approximately four hours, the jury requested that the court reread its instructions on "what constitutes aiding and abetting." (Tr. 473). After the court re-read the entire instruction on aiding and abetting aggravated murder, the jury retired to deliberate. (Tr. 474-78). Approximately two hours later, the jury returned guilty verdicts. (Tr. 478). These facts indicate that the jury's verdict was influenced by the aiding and abetting instruction.

Respondent argues that the omission of a clarifying instruction did not deny Bell his rights under the Due Process Clause because the court properly instructed the jury on the elements of aiding and abetting aggravated murder, and because the court emphasized that the state had the burden of proving the essential elements of the charged offenses. (Doc. 19, p. 33 (citing Tr. 461, 465-69)).

Although the court generally instructed the jury that the state had the burden of proving the purpose-to-kill element, the portions of the instructions respondent points to did not clarify that in order to convict Bell, the jury must find he alone possessed a purpose to kill.

The errors in the jury instructions constitute a Due Process Clause violation unless the instructions as a whole prevented a reasonably juror from assuming that the state did not have to prove Bell's purpose to kill. *See Francis,* 471 U.S. at 315; *Clark,* 676 F.2d at 1105-06. A thorough review of the entire jury instructions fails to reveal any portion of the instruction which clarified that an independent purpose to kill on Bell's part was required or that the existence of Gambill's purpose to kill did not necessarily establish Bell's purpose to kill. As in *Clark,* Bell's jurors were never told that his culpability, whether established by direct proof or by a *Lockett*-type inference, must first be established before he could be convicted of aiding and abetting aggravated murder. *Clark,* 676 F.2d at 1105. A reasonably juror could easily have understood the instructions as a whole to mean that Bell alone did not have to possess a purpose to kill, and that Gambill's purpose was sufficient to convict Bell so long as he participated somehow in a conspiracy. *See id.*

We must next determine whether the *Sandstrom* error was harmless beyond a reasonable doubt. *Rose v. Clark,* 478 U.S. 570, 579-82 (1986); *Chapman v. California,* 386 U.S. 18 (1967). In order to determine whether the erroneous instruction was harmless, the record must establish that the evidence was so dispositive of Bell's intent that it can be concluded beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption. *See Merlo v. Bolden,* 801 F.2d 252, 257 (6th Cir.) (citing *Connecticut v. Johnson,* 460 U.S. 73, 97 n.5 (1983) (Powell, J. dissenting) (approved in *Rose,* 478 U.S. at 583)), *cert. denied,* 480 U.S. 909 (1986). The reasoning underlying this inquiry is that where a conviction is correct beyond a reasonable doubt, a reversal of the conviction based on a *Sandstrom* error does not promote the interest

Sandstrom serves - ensuring that only the guilty suffer criminal punishment. *Rose*, 478 U.S. at 580.

A review of the entire record establishes that the *Sandstrom* error was not harmless beyond a reasonable doubt. The state's theory at trial was that Bell went to the trailer on the night of the killings for the purpose of threatening Kennard and Coleman into giving Bell money for his damaged Camaro. The substantive evidence supports this theory. Reeder testified that he saw Bell point the revolver at Kennard when Bell was arguing with her. *Supra.* at 3. He also answered affirmatively when state's counsel asked him if the argument between Bell and Kennard was "a pretty big argument . . . with bad words flying between the two of them." (Tr. 257). However, Reeder also provided testimony favorable to Bell. *See supra* at 13. Callihan, one of Bell's co-inmates at the Scioto County jail before trial, testified that Bell told him that when he handed Gambill the revolver, "he [Bell] knew. . . when they left the trailer, [the] girls would not be alive." (Tr. 381). Callihan further testified that Bell told him, "revenge was a good feeling because of what the girls had done to them." *Id.* Bell denied making these statements. (Tr. 401).

Bell's theory was that he was a bystander to the killings. He repeatedly testified that he never intended to kill or even to harm Kennard or Coleman, and that he never threatened either of them. (Tr. 289, 293, 300, 401). Bell explained that he went to the trailer on the night of the murders to "party" with Kennard and Coleman. During direct-examination Bell's counsel asked, "Did you have anything in mind when you went to the trailer the night those girls were killed, other than trying to get your money and having a party?" Bell answered, "No, I didn't." (Tr. 300). Then Bell's counsel asked, "Did you at any time while you were there threaten either one of the girls?" Bell responded, "No, I didn't." (Tr. 300).

In the presence of Bell's repeated testimony disavowing any purpose to kill, the state's evidence is simply not so

dispositive of the existence of Bell's purpose to kill that the jury would have found it unnecessary to attribute the existence of Gambill's intent to Bell. Under a proper jury instruction, the jury would first have to discredit Bell's testimony before they could find him guilty of aiding and abetting aggravated murder. Bell's disputed testimony does not exonerate him, but it does place all the evidence in such a balanced state that it cannot be concluded beyond a reasonable doubt that the jury would have found it unnecessary to rely on the existence of Gambill's intent to establish Bell's intent. *See Merlo,* 801 F.2d at 257.

If the jury believed Bell's testimony concerning his lack of intent to kill, a correct instruction would have permitted acquittal because the state would have failed to prove Bell's intent beyond a reasonable doubt. In contrast, when the improper instruction is considered in combination with the overwhelming evidence of Gambill's purpose to kill, it is clear that the jury was not required to reach the issue of whether Bell possessed a purpose to kill in order to convict him. Thus, the erroneous instruction allowed the jury to convict Bell even if they found his testimony credible by finding that Gambill alone intended to kill Kennard and Coleman. The instructions therefore had the effect of nullifying Bell's testimony on the critical issue of intent, thereby preventing the *Sandstrom* error from being harmless.

In those cases where the United States Court of Appeals for the Sixth Circuit has found harmless error despite the presence of a *Sandstrom* violation, the harmless error existed because of the obvious evidence of defendant's intent to kill. *See e.g. Burton v. Foltz,* 810 F.2d 118 (6th Cir. 1987). In Bell's case, evidence of Bell's guilt, although persuasive and sufficient to convict, is not obvious. *See supra* at 2-5; *see also Merlo,* 801 F.2d at 257; *Clark,* 676 F.2d at 1105-06. When considering Bell's insufficiency of evidence argument on direct appeal, the Ohio Court of Appeals determined that the judgment of conviction was not against the manifest weight of the evidence. (Doc. 8, Ex. E at 11). However, a finding of sufficiency by a state

court of appeals is not dispositive of the harmless error question. *See Williams v. Engle*, 683 F.2d 152, 153 (6th Cir. 1982) (interpreting 28 U.S.C. 2254(d)). The evidence was simply not so obviously indicative of Bell's purpose to kill that it rendered the *Sandstrom* error harmless. *Compare Merlo*, 801 F.2d at 257 *and Clark*, 676 F.2d at 1105-06 *with Burton*, 810 F.2d at 122-23.

Accordingly, the *Sandstrom* error in the jury instruction deprived Bell of his rights under the Due Process Clause.

B. *Both Cause And Prejudice Exist For Bell's Failure To Raise His Challenge To The Jury Instructions In State Court.*

United States Magistrate J. Vincent Aug, Jr. originally recommended the dismissal of Bell's petition because he concluded that Bell had not exhausted his ineffective assistance of appellate counsel claim in Ohio courts. (Doc. 10). After Magistrate Aug discovered what he concluded to be an unexhausted claim, he did not review the numerous remaining claims since he considered the petition a mixed petition, subject to dismissal in its entirety under *Rose v. Lundy*, 455 U.S. 509 (1982). (Doc. 10, p. 5). As a result, when the District Judge considered Bell's objections to Magistrate Aug's report and recommendation, *see supra* at 5-6, it is unclear whether the issues of exhaustion and waiver in regards to Bell's challenge to the jury instructions were before the District Judge. It is therefore necessary to rule on the procedural posture of Bell's due process challenge to the jury instructions.

In recognition of the equal obligation of the state courts to protect the constitutional rights of criminal defendants, and in order to prevent needless friction between the state and federal courts, a state defendant with federal constitutional claims is required to fairly present those claims to the highest court of the state for consideration. 28 U.S.C. §2254(b), (c). If he fails to do so, but still has an avenue open to him by which he may present the

claims, his petition is subject to dismissal for failure to exhaust state remedies. *Id.; Anderson v. Harless,* 459 U.S. 4, 6 (1982) (per curiam); *Picard v. Connor,* 404 U.S. 270, 275-76 (1971).

Bell directly appealed his judgment of conviction to the Ohio Court of Appeals for the Fourth Appellate District, and to the Ohio Supreme Court. *Supra* at 5. Since he took a direct appeal, he cannot under Ohio law seek a delayed direct appeal of the judgment of conviction. *See Keener v. Ridenour,* 594 F.2d 581, 586 (6th Cir. 1979) (construing Ohio R. App. P. 5 (A)). Moreover, Bell's challenge to the jury instructions on due process grounds is not cognizable in a petition for post-conviction relief pursuant to Ohio Rev. Code §2953.21 (Anderson 1987) because the doctrine of *res judicata* bars the pursuit of claims that Bell could have argued on direct appeal, as long as the claims do not involve allegations beyond the scope of the record. *See Ewing v. McMackin,* 799 F.2d 1143, 1151 n.15 (6th Cir. 1986); *see also State v. Cole,* 2 Ohio St.3d 112 (1982); *State v. Perry,* 10 Ohio St.2d 175 (1967). Although Bell has not presented the substance of his due process challenge to the jury instructions to Ohio courts, he presently has no remaining avenue of redress available in Ohio. As a result, requiring Bell to pursue his due process claim in Ohio courts would be futile. *See Leroy v. Marshall,* 757 F.2d 94, 97 (6th Cir.), *cert. denied,* 474 U.S. 831 (1985). It therefore appears that Bell has exhausted his due process challenge to the jury instructions. *See Id.; Harless,* 459 U.S. at 6-8; *Picard,* 404 U.S. 275-278.

If, due to a procedural default, Bell can no longer present his constitutional challenge to the jury instructions in state court, he has waived it for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error. *See Murray v. Carrier,* 477 U.S. 478, 485 (1986); *Engle v. Isaac,* 456 U.S. 107, 129 (1982); *Wainwright v. Sykes,* 433 U.S. 72, 87 (1977); *Maupin v. Smith,* 738 F.2d 135 (6th Cir. 1986). Bell's trial counsel

committed procedural default by failing to object to the jury instructions since Ohio's contemporaneous objection rule required an objection at trial in order to preserve the issue for appellate review. *See Isaac*, 433 U.S. at 124-26 (citing *State v. Humphries*, 51 Ohio St.2d 95 (1977); *State v. Gordon*, 28 Ohio St.2d 45 (1971)); *see also State v. Williams*, 39 Ohio St. 2d 20 (1974); *State v. Lancaster*, 25 Ohio St. 2d 83 (1971). As a result Bell must establish cause and actual prejudice for his procedural default. *See Sykes*, 433 U.S. at 87; *Isaac*, 456 U.S. at 126-29; *see also Cook v. Foltz*, 814 F.2d 1109 (6th Cir.), *cert. denied*, 484 U.S. 837 (1987); *Maupin*, 785 F.2d at 138-39.

Bell can establish cause for his procedural default if his trial counsel provided constitutionally ineffective assistance under *Strickland* in a manner that resulted in the procedural default. *See Carrier*, 477 U.S. at 488-89. The following discussion took place during a charge conference:

> The Court: In this case, when talking about the elements of aggravated murder, I intend to instruct the jury that they have to find that the killings were done with prior calculation and design. And then I will define what that is. And, if you find that David Gambill actually formed a purpose to kill and it was arrived at with prior calculation and design, that that [sic] is sufficient for this element of the crime. The purpose to kill is an essential element of the crime of aggravated murder and a person acts purposely when it is his specific intention to cause a certain result; and it must be present in the mind of David Gambill this specific intention to kill Donna Jean Kennard and Deborah Renee Coleman. Do you see any objection to that, gentlemen?
>
> [Bell's Counsel]: Yes. Judge—
>
> The Court: That's all it can be, because like I said, I propose to instruct on aiding and abetting.

> Therefore, *they have to find that he aided and abetted under the definition I have given of the intention of David L. Gambill in the aggravated murders of these two girls. I can't say there has to be a purpose in the mind of Bell to have done this, because that's not here.*
>
> [Bell's Counsel]: Isn't there a part of the charge that says Gambill's act has to be a natural or probable consequence?
>
> The Court: It has to show it was a natural or probable consequence. You have it there . . .
>
> [Bell's Counsel]: We have it?
>
> The Court: Yes. I define the elements, then I give the statutory definition of aiding and abetting. That's the first thing, which I usually don't do; then here I go on with the other general instructions which you have on aiding and abetting . . . [reads the proposed instruction]. . .
>
> [Bell's Counsel]: *All right, no problem with that.*
>
> The Court: All right. The only difference in that is the intent. Ordinarily you have to find that the defendant had the purpose to kill and that isn't the case here. I have just changed that definition that the defendant formed a purpose to kill, to David L. Gambill formed a purpose to kill.
>
> [State's Counsel]: We're satisfied with that.

Tr. 355-357 (emphasis added).

Bell's trial counsel provided ineffective assistance by failing to object to the jury instructions. It was settled law in Ohio at the time of Bell's trial that purpose to kill was an element of aiding and abetting aggravated murder. *Supra* at 30-31. Reasonable counsel would have objected

to the jury instruction on the basis of Ohio law and on the basis of the Supreme Court's decisions in *Winship* and *Mullaney*, cases that the principles enunciated in *Winship* provided adequate grounds on which to rest a constitutional objection to the jury instructions. *Id.* at 131-34. Bell's case is distinguished from *Isaac*, even though the cases involve identical procedural defaults, due to the differing grounds for the existence of cause. In Bell's case, cause existed for the procedural default because of counsel's constitutionally ineffective assistance. Therefore, *Isaac* does not mandate a ruling of no cause in Bell's case. *Carrier* yields a similar conclusion because the Court in *Carrier* rested its conclusion that the petitioner had failed to establish cause on his disavowal of any ineffective assistance of counsel claim. *Carrier*, 477 U.S. at 497.

Having established cause, Bell must also establish that he suffered actual prejudice from the alleged constitutional violation. *Supra* at 38. For the purposes of a prejudice analysis, it must be assumed that Bell has stated a meritorious *Sandstrom* claim, *see Maupin*, 785 F.2d at 139, and the instructional error must be analyzed to determine if it "infected [the] entire trial with error of constitutional dimension." *Fornash v. Marshall*, 686 F.2d 1179, 1187 (6th Cir. 1982) (citing *U.S. v. Frady*, 456 U.S. 152, 170 (1982)), *cert. denied*, 460 U.S. 1042 (1983)). Assuming then that the jury instructions contained a *Sandstrom* error, this constitutional error impacted so negatively upon the central issue of Bell's guilt of [sic] innocence that it infected Bell's trial with an error of constitutional magnitude. *See supra* at 34-36.

Accordingly, both cause and prejudice exist for Bell's procedural default.

VI. *Bell Is Entitled To An Evidentiary Hearing On His Allegations Of Juror Misconduct.*

In one of his rhetorical questions, Bell's current counsel asks, "[w]hat heavy defense ought to be given to counsel's

ignoring the information that jurors in the Bell case and Gambill cases were talking together in the concession area of the courthouse (and some were observed talking to the victims [sic] mother)?" (Doc. 2, p. 31 (citing Aff. James Bell ¶11; Aff. Clara Bell ¶¶4A, 4B, 4C)).

Bell states in his affidavit:

> [T]his affiant believes that ineffective assistance is further demonstrated by jurors from Dave Gambill's trial talking with jurors from my trial during trial recesses in the courthouse concession area. When I brought this to [trial counsel's] attention he said not to worry about that.

(Doc. 2, Aff. James Bell, ¶11).

Clara Bell (Bell's mother) states in her affidavit:

> At James Bell's trial one Emma Jean Piatt went to the rest room during a recess and observed some jurors speaking to the mothers of the victims of Dave Gambill;
>
> When Emma Jean Piatt relayed this information to this affiant and one Bernice Craft we immediately relayed this information to [Bell's trial counsel]; [Trial counsel] told this affiant (in the presence of Bernice Craft) that it's too late to do anything about it."

(Doc. 2, Aff. Clara Bell, ¶¶4A, 4B, 4C).

Bell included the affidavit of Emma Jean Piatt in his reply to respondent's second supplemental return of writ. Piatt states:

> I saw a juror speaking to another person in the rest room during [Bell's] trial;

> I relayed this information to Clara Bell and was informed that it was Donna Kinnard's [sic] mother to whom the juror was talking;
>
> I heard Charles Bell and Clara Bell relay this information to [Bell's trial counsel] who indicated only that 'It's too late to do anything about it now.'

(Doc. 24, Aff. Piatt, ¶¶3-5).

Bell is entitled to an evidentiary hearing on this issue because its resolution turns on factual allegations of juror misconduct which are beyond the scope of the record. *See* 28 U.S.C. §2254(d); *Smith v. Phillips*, 455 U.S. 209, 215 (1982); *Remmer v. United States*, 347 U.S. 227, 229 (1954). However, in light of the recommendation in Part V of this Report, an evidentiary hearing is unnecessary unless the District Court rejects Part V of this report and recommendation.

VII. *The Parties Have Not Addressed Bell's Claim of Ineffective Assistance Of Appellate Counsel.*

Bell's appellate counsel raised four assignments of error on direct appeal to Ohio's Fourth Appellate District Court of Appeals. (Doc. 8, Ex. E; *Ohio v. Bell*, No. 1252, slip op. at 1-2 (4th App. Dist. Oct. 15, 1980). The Court of Appeals overruled the first three assignments of error on the merits. In his fourth assignment of error, counsel challenged the trial court's denial of his motion for a new trial. The Court of Appeals overruled this issue due to the failure of Bell's appellate counsel to file a timely notice of appeal. *Id.* at 16.

Bell argues that his appellate counsel was ineffective by not filing a timely direct appeal of the trial court's denial of his motion for a new trial. Bell asserts that by not filing a timely appeal on this issue, his appellate counsel "waived review and post-conviction relief of the unconstitutionality of O.R.C. §2923.03 under *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977); review of the offending

jury instructions, and [Bell] was denied meaningful appellate review [sic]". (Doc. 2, p. 37-38, citing *Entsminger v. Iowa*, 386 U.S. 748 (1967)). Bell cites the following cases in support of his ineffective assistance of appellate counsel arguments: *Gilbert v. Sowders*, 646 F.2d 1146 (6th Cir. 1981); *Cleaver v. Bordenkircher*, 634 F.2d 1010 (6th Cir. 1980), *cert. denied*, 451 U.S. 1008 (1981); *Boyd v. Cowan*, 519 F.2d 182 (6th Cir. 1975); *Woodall v. Neil*, 444 F.2d 92 (6th Cir. 1971); and *Benoit v. Wingo*, 423 F.2d 880 (6th Cir.), *cert. denied*, 400 U.S. 852 (1970).

Respondent argues that Bell is procedurally barred from federal habeas review of his claims regarding ineffective assistance of appellate counsel to the extent that the claim relates to matters on the record. Respondent contends that this is so because Bell could have raised them in his original appeal to the Ohio Supreme Court and because he has shown neither cause nor prejudice for the failure to pursue these claims in Ohio courts. (Doc. 19, p. 6-9).

The parties have not had the benefit of addressing the waiver issue in light of the recent Supreme Court decisions in *Harris v. Reed*, 109 S.Ct. 1038 (1989), and *Teague v. Lane*, 109 S.Ct. 1060 (1989). However, due to the recommendations in Part V of this report, it is unnecessary to order the parties to address the waiver issue at this time. In the event the District Court rejects Part V of this Report and Recommendation, the parties should be ordered to address the issue of waiver in light of *Harris*, and *Peoples*.

RECOMMENDED DECISION

It is THEREFORE RECOMMENDED that:

The petition for writ of habeas corpus be GRANTED unless respondent retries Bell within sixty (60) days of the date of this Court's final judgment, or within such further time as the Court may allow for good cause shown.

DATE: 3-30-90

mm

/s/ Robert A. Steinberg

ROBERT A. STEINBERG
UNITED STATES MAGISTRATE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES L. BELL,	:	
Petitioner,	:	
vs.	:	No. C-1-85-1614
TERRY L. MORRIS,	:	ORDER REJECTING MAGISTRATE'S REPORT
Respondent.	:	AND RECOMMENDATION
	:	Filed May 23, 1988 [File stamp deleted]

Petitioner, James L. Bell, is serving two consecutive life terms under Respondent Morris' custody at the Southern Ohio Correctional Facility for his conviction in 1979 on two counts of aggravated murder in violation of Ohio Rev. Code §2903.01(A). The Ohio Court of Appeals affirmed the verdict of the trial court, and the Ohio Supreme Court dismissed Bell's appeal for failure to state a substantial constitutional question.

Petitioner brings this habeas corpus action pursuant to 28 U.S.C. §2254, and asserts as grounds for relief that he received ineffective assistance of counsel at the trial court level and on appeal. Respondent Morris argues that the petitioner has failed to exhaust his state court remedies as required under 28 U.S.C. §2254(b) in that the petitioner has not pursued post-conviction relief under Ohio Rev. Code §2953.21.

The petition was referred to the United States Magistrate pursuant to 28 U.S.C. §636(b)(1)(B) for Report and Recommendation. The Magistrate recommends that Bell's petition for habeas corpus be dismissed without prejudice to his refiling upon the exhaustion of his state remedies, namely the Ohio post-conviction relief statute, Ohio Rev.

Code §2953.21. For the reasons set forth in this opinion, we reject the Report and Recommendation of the Magistrate.

Standard of Review

In determining whether to accept or to reject the Magistrate's Report and Recommendation, the District Court "shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the Magistrate." 28 U.S.C. §636(b)(1); *Flournoy v. Marshall,* 842 F.2d 875, 876 (6th Cir. 1988); *United States v. Shami,* 754 F.2d 670 (6th Cir. 1985).

Exhaustion of Remedies

28 U.S.C. §2254(b) provides that a writ of habeas corpus shall not be granted "unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Subsection (c) of the statute provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

The doctrine of exhaustion of state remedies is "an accommodation of our federal system designed to give the state an initial 'opportunity to pass upon and correct' alleged violations of its prisoner's federal rights." *Wilwording v. Swenson,* 404 U.S. 249, 250 (1971); *Picard v. Connor,* 404 U.S. 270, 275 (1971); *Keener v. Ridenour,* 594 F.2d 581, 584 (6th Cir. 1979). The exhaustion of available state remedies requires more than simply seeking appellate review of a criminal conviction on some

tenable ground. Thus, where a state petitioner asserts a claim cognizable under federal habeas corpus that was not presented to the state appellate courts, but which could be heard in some form of state post-conviction review proceeding, that remedy must be pursued before federal habeas corpus will lie. *Picard,* 404 U.S. at 275-276; *Keener,* 594 F.d [sic] at 584. The exhaustion requirement is satisfied once the federal claim has been fairly presented to the state courts. *Picard,* 404 U.S. at 275; *Koontz v. Glossa,* 731 F.2d 365, 368 (6th Cir. 1984). As the Supreme Court explained in *Picard,* "[w]e simply hold the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard,* 404 U.S. at 278. Thus, the precise issue to be determined in this case is whether petitioner Bell fairly presented his ineffective assistance of counsel claims to the state courts.

The State of Ohio has enacted a post-conviction remedy for persons convicted of criminal offenses, Ohio Rev. Code §2953.21. This section provides in pertinent part that:

> Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

Ohio Rev. Code Ann. §2953.21(A) (Anderson 1980).

It is undisputed that petitioner Bell has not sought relief under the Ohio statute. However, petitioner argues that

he is precluded from the relief provided by the statute as a result of his appellate counsel's failure to argue his trial counsel's ineffectiveness.

In his memorandum in opposition to the Report and Recommendation of the Magistrate, the petitioner cites Ohio caselaw that bars him from post-conviction relief under the statute. Petitioner further argues that the Ohio courts have refused to recognize his ineffective assistance of counsel claim, thus making this federal habeas corpus action petitioner's only recourse. Finally, petitioner asserts that fundamental fairness mandates that he not be required to engage in futile acts in Ohio post-conviction relief proceedings.

In his Report and Recommendation, the Magistrate correctly note [sic] that the issue of the trial counsel's ineffective assistance is *res judicata* in the Ohio courts under *State v. Cole,* 2 Ohio St.3d 112, 113-114, 443 N.E.2d 169 (1982). The Magistrate also found, however, that petitioner's claim alleging the ineffective assistance of his appellate counsel for failing to raise the issue of the ineffective assistance of petitioner's trial counsel has not yet been presented to the state courts. Therefore, according to the Magistrate, this claim is unexhausted.

In his memorandum in support of jurisdiction to the Ohio Supreme Court, the attorney then representing petitioner did not raise any issues relating to either appellate or trial counsel's ineffectiveness. However, in a *pro se* memorandum filed in the Supreme Court, Bell asserted the following proposition of law:

> Where counsel failed to properly raise issues on appeal which could have been raised and should have been raised then the accused has been denied the effective assistance of counsel on direct appeal in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

In his memorandum petitioner alleged five errors by his appellate counsel. While the Magistrate is correct that the precise issue of whether the appellate counsel was ineffective in failing to assert the ineffective assistance of the trial counsel was not raised by Bell in his memorandum, Bell's proposition of law relating to the general ineffective assistance of his appellate counsel was presented to the Ohio Supreme Court, which declined jurisdiction on the basis that Bell could not state a substantial constitutional question. Petitioner, therefore, has fairly presented the substance of the federal habeas corpus claim to the Ohio courts as required by *Picard,* and has thus satisfied the exhaustion requirement of 28 U.S.C. §2254(b) and (c).

We must also note at this point that the Ohio post-conviction relief statute would not provide a remedy for the alleged ineffective assistance of Bell's appellate counsel. The trial court to whom the petition for relief is made is not empowered under the statute to address claims of ineffective assistance of *appellate* counsel. Moreover, such a remedy, if available, would be directly contrary to the fundamental principles upon which our judicial system functions; that is, that an appellate court is superior to a trial court. *See, e.g., State v. Rone,* Slip Op. No. C-820640 (Ohio Ct. App., First Appellate District, Aug. 31, 1983).

Therefore, we conclude that the Report and Recommendation of the Magistrate should be rejected, that petitioner's petition for writ of habeas corpus is properly before the Court, and that this case should be remanded to the Magistrate for a recommendation on the merits of Bell's claims.

SO ORDERED.

/s/ Judge S. Arthur Spiegel

S. Arthur Spiegel
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES L. BELL,	:	
Petitioner,	:	
vs.	:	CIVIL NO. C-1-85-1614 (S)(A)
TERRY L. MORRIS,	:	REPORT AND RECOMMENDATION OF
Respondent.	:	THE MAGISTRATE
	:	Filed January 27, 1987 [File stamp deleted]

Presently pending before this Court is James Bell's petition for habeas corpus pursuant to 28 U.S.C. §2254. Petitioner is in respondent's custody pursuant to a conviction for two counts of aggravated murder. Petitioner was sentenced by the trial court to serve consecutive life sentences.

Petitioner appealed his conviction to the Ohio Court of Appeals which by decision affirmed the trial court's judgment. *Ohio v. Bell,* No. 1252, Scioto Cty. Court of Appeals, October 15, 1980. Thereafter, review was sought by petitioner in the Ohio Supreme Court which *sua sponte* dismissed the appeal for failure to state a substantial constitutional question. Subsequently, the petitioner filed several motions for new trial which were all denied (petitioner's reply memorandum). The petitioner, however, has never sought post-conviction relief pursuant to Ohio Rev. Code §2953.21.

In his habeas petition, Bell asserts as grounds for relief, *inter alia,* that he received ineffective assistance of counsel at the trial court level and upon appeal. Respondent argues that petitioner has failed to exhaust his state court remedies by not pursuing post-conviction

relief under Ohio Rev. Code §2953.21.

This case presents a novel situation. At the outset, it is important to note that the petitioner was represented by different counsel at trial and on appeal.

The issue of ineffective assistance of counsel is one of the few issues properly raised in Ohio post-conviction relief proceedings *State v. Perry,* 10 Ohio St. 2d 175 (1967); *State v. Milanovich,* 42 Ohio St. 2d 46 (1975). When a defendant is represented by new counsel on appeal, the issue of his trial counsel's effectiveness must be raised on direct appeal or res judicata will bar its further judicial consideration by the state courts. *State v. Cole,* 443 N.E.2d 169 (1982); *State v. Ledger,* 477 N.E.2d 643 (Ohio C.A. 1984). Since petitioner was represented by new counsel on appeal, *State v. Cole, supra,* at first blush would seem to preclude the determination of the issue of effective assistance of trial counsel in the Ohio courts.

Petitioner, however, also alleges that he did not receive effective assistance of counsel on appeal because his appellate counsel failed to raise the issue of his trial counsel's effectiveness in his direct appeal. The issue of appellate counsel's effectiveness was raised for the first time by petitioner when he filed a *pro se* memorandum in support of jurisdiction to the Ohio Supreme Court. Petitioner, however, failed to designate as error appellate counsel's failure to raise the issue of effectiveness of trial counsel. Therefore, this precise issue is argued for the first time in his federal habeas corpus proceeding.

The procedural posture of this issue is extremely important. Although the state courts rely upon the concept of res judicata to preclude their determination of the issue of trial counsel's effectiveness, a federal habeas court must determine the issue using a procedural default-waiver analysis. *Wainwright v. Sykes,* 443 U.S. 72 (1977). If appellate counsel is determined to have been ineffective resulting in prejudice to the petitioner under *Strickland v. Washington,* 466 U.S. 668 (1984), such a deficient

performance would constitute cause for a procedural default under *Murray v. Carrier*, 54 L.W. 4820 (June 26, 1986). Therefore, assuming *arguendo* that petitioner could prove prejudice, the issue of his trial counsel's effectiveness could be appropriately determined on the merits by a federal habeas corpus court. Otherwise, petitioner would be barred from raising the issue of his trial counsel's effectiveness in federal court because of his state procedural default. *Wainwright v. Sykes*, 443 U.S. 72 (1977).

Therefore, the determination of whether petitioner received effective assistance of counsel on appeal is crucial. In *Evitts v. Lucey*, 469 U.S. 387 (1985), the Supreme Court held that due process requires that a defendant have effective assistance of counsel on his first appeal of right. In *Evitts*, the issue of appellate counsel's effectiveness was raised for the first time in federal habeas proceedings. The issue of exhaustion was not argued or reached in that case. In the instant case, however, exhaustion of state remedies is in controversy.

Where, as here, the petitioner raises serious questions concerning his appellate counsel's performance, it is appropriate that the state courts be afforded the opportunity to address and decide that issue before a federal court intrudes in the orderly process of the state criminal judicial system. Because his claim of appellate counsel's ineffectiveness has never been presented to the Ohio state courts, this claim is unexhausted. Petitioner is advised that the issue should be properly presented to the Ohio state courts by means of post-conviction relief proceedings pursuant to Ohio Rev. Code §2953.21 [sic]

In conclusion, because petitioner's writ of habeas corpus contains both exhausted and unexhausted claims, *Rose v. Lundy*, 455 U.S. 509 (1982) mandates its dismissal for failure to exhaust state court remedies.

For reasons stated above, this Magistrate RECOMMENDS that petitioner's writ of habeas corpus

be DISMISSED without prejudice to his refiling upon the exhaustion of his state court remedies.

/s/ J. Vincent Aug, Jr.

J. Vincent Aug, Jr.
United States Magistrate